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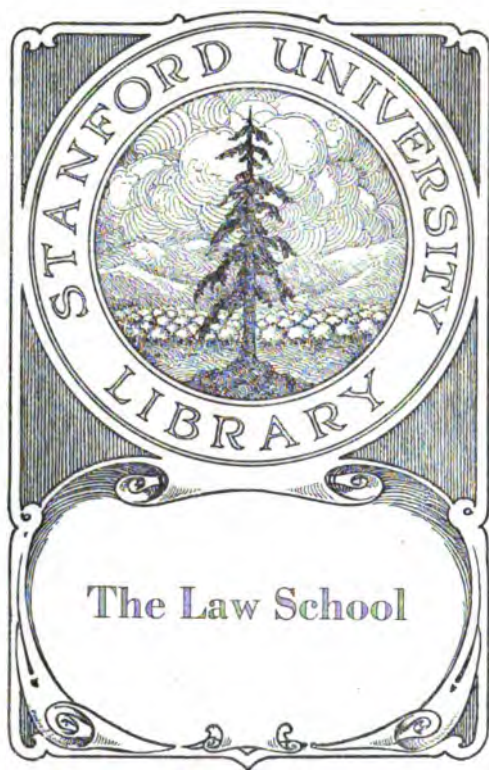
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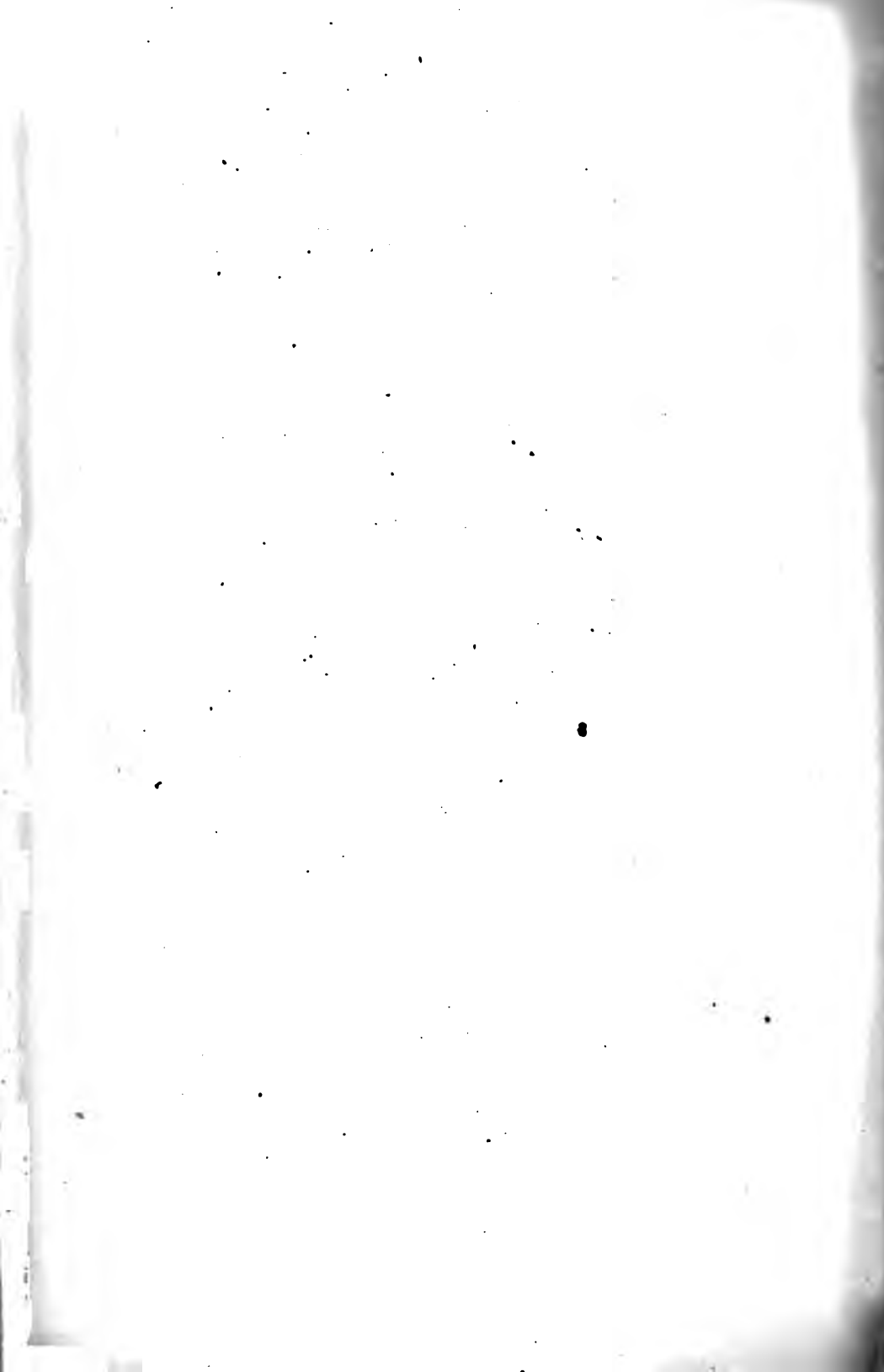
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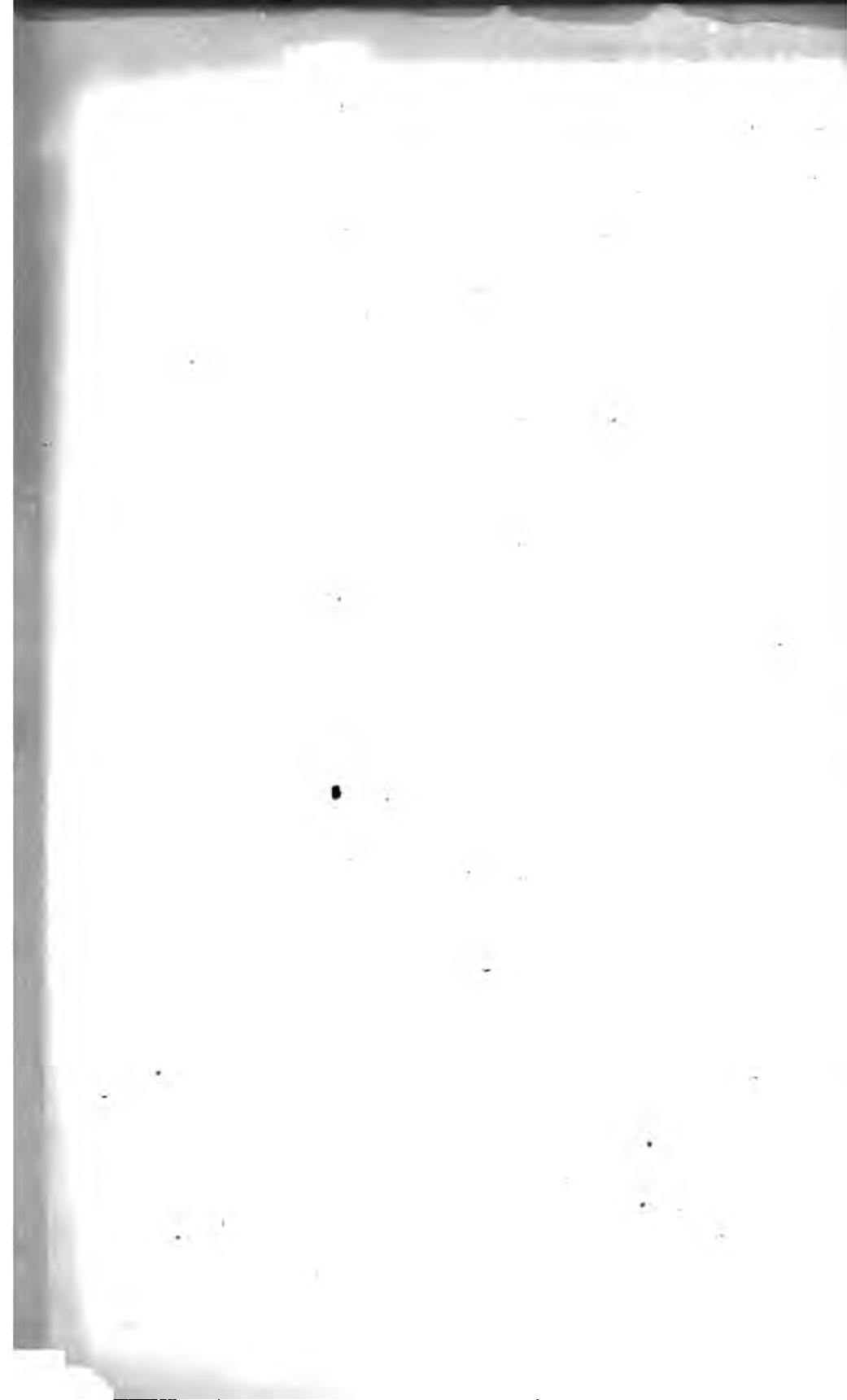
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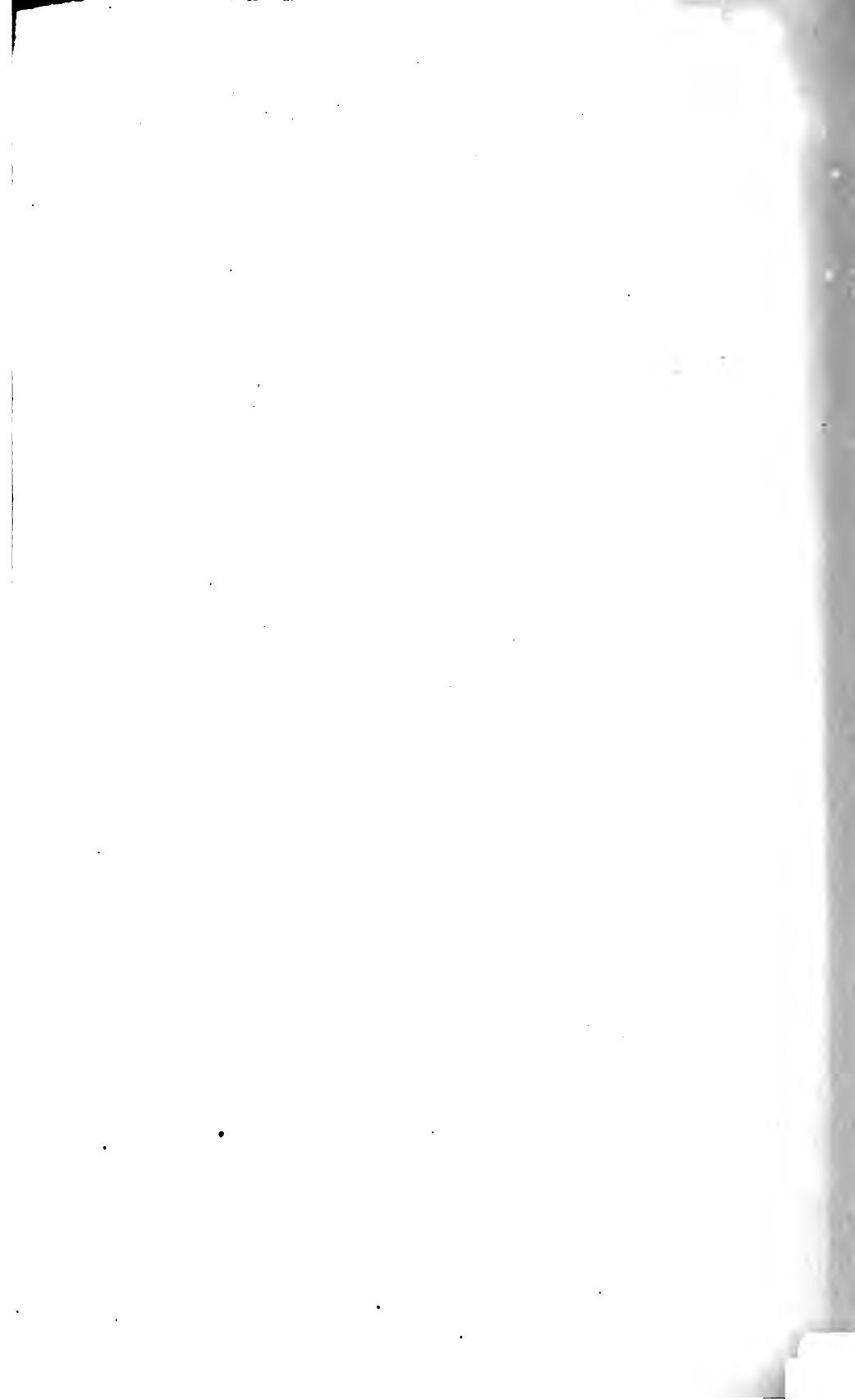
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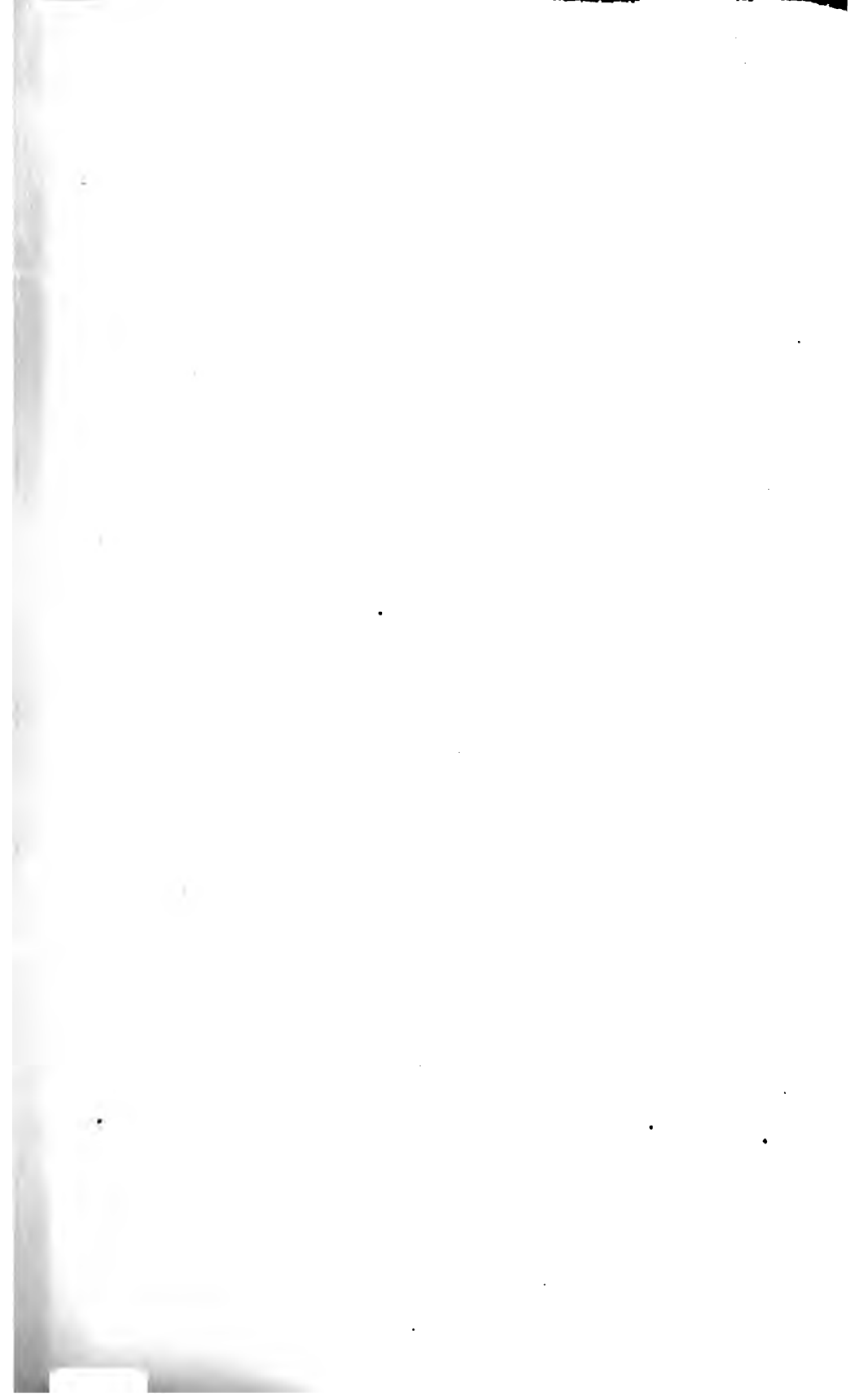
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REPORTS
OF
CASES DECIDED
BY THE
ENGLISH COURTS,
WITH
NOTES AND REFERENCES TO KINDRED CASES
AND AUTHORITIES.

BY
NATHANIEL C. MOAK,
Counsellor at Law.

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¹ Appointed April 30, under the act of April 24, 1877: 12 Law Jour., 251.

² Resigned June 11, 1879: 14 Law Journal, 365; 67 Law Times, 127.

³ Appointed June 11, 1879: 14 Law Journal, 365; 67 Law Times, 127.

⁴ Resigned January, 1879: 14 Law Jour., 15; 66 Law Times, 191.

⁵ Appointed January, 1879, in place of Baron CLEASBY: 14 Law Journal, 34; 66 Law Times, 191.

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APPEAL CASES
BEFORE THE
HOUSE OF LORDS
(ENGLISH, IRISH, AND SCOTCH)
AND THE
JUDICIAL COMMITTEE
OF
HER MAJESTY'S MOST HONORABLE
PRIVY COUNCIL.

[2 Appeal Cases, 743.]

H.L.(E.), April 30; May 8; July 27, 1877.

[HOUSE OF LORDS.]

***THE RIVER WEAR COMMISSIONERS, Appellants; [743
and WILLIAM ADAMSON and Others, Respondents⁽¹⁾.**

New Statutory Liability—Piers and Harbors—Shipping—Act of God.

A statute which refers to the matter of a common law liability and declares to whom it shall attach, will not thereby create a new and extended application of that liability, unless it contains words expressly declaring such a purpose.

The 10 Vict. c. 27 (The Harbors, Docks and Piers Act, 1847) enacted that "The owner of every vessel, or float of timber, shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbor, dock, or pier, or the quays or works connected therewith; and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same; and the undertakers may detain any such vessel, or float of timber, until sufficient security has been given for the amount of damage done by the same." There was a proviso exempting the owner from liability in cases where the vessel was in charge of a licensed pilot whom the owner was "bound by law to employ and put his vessel in charge of":

Held (affirming the judgment of the Court of Appeal), that, in a case where the damage to the pier had been occasioned by a vessel, through the violence of the winds and waves, at a time when the master and crew had been compelled to escape from the vessel, and had, consequently, no control whatever over it, the owners were not liable.

(¹) Affirming 17 Eng Rep., 190,

Per THE LORD CHANCELLOR (Lord Cairns): The clause is a clause of procedure only, dealing with the mode in which a right of action already existing shall be asserted, but not creating a new and extended liability.

LORD GORDON, diss., on the ground that the intention of the Legislature in passing the act must be decided by the ordinary meaning of the words used, and here the words used in the first portion of the section were words creating a liability without any restriction whatever.

THIS was an appeal against a decision of the Court of Appeal, by which a judgment of the Queen's Bench Division had been reversed⁽¹⁾.

The respondents were the owners of a steam vessel called the *Natalian*, which, on the 17th of December, 1872, was [744] proceeding *on a voyage from the Thames to the Tyne, when it encountered a violent storm near the mouth of the Wear, and went ashore at the entrance of the Sunderland Docks, the persons on board being saved by the rocket apparatus. The men had not been able, before they escaped from the wreck, to take down the sails, which were therefore left fully unfurled at the moment that the vessel went on shore. The tide was then low. The storm continued, and, when the tide rose, the sails acted on the vessel, which partly floated, canted round, and struck against and injured the pier. The commissioners under the Harbors, Docks and Piers Act of 1847 (10 Vict. c. 27) ⁽²⁾ sought to recover damages for this injury. The declaration set forth the statute, and alleged negligence on the part of the master and crew; and the defendants, among other pleas, set up an allegation of negligence on the part of the commissioners and their servants, but these allegations of negligence were, by mutual consent, withdrawn, and the case went to the jury on the plea of the general issue alone.

The cause was tried before Mr. Justice Quain at the Durham Summer Assizes of 1873, when a verdict was entered for the plaintiffs (the commissioners); the amount of damages was referred to an arbitrator, and leave was reserved to the defendants to move to enter a nonsuit, or a verdict for the defendants. A motion was subsequently made for

⁽¹⁾ 1 Q. B. D. 546; 17 Eng R., 190.

⁽²⁾ By the 10th Vict. c. 27, s. 74, it was enacted that "The owner of every vessel, or float of timber, shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbor, dock, or pier, or the quays or works connected therewith; and the master, or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to

make good the same, and the undertakers may detain any such vessel, or float of timber, until sufficient security has been given for the amount of damages done by the same: Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall, at the time when such damage is caused, be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ, and put his vessel in charge of."

this purpose, when, on the authority of the case of *Dennis v. Tovell* (¹), the rule was refused. On appeal this decision was reversed, and the verdict was ordered to be entered for the defendants. This appeal was then brought.

*Mr. *C. Russell*, Q.C., and Mr. *Shield* (Mr. *Her-* [745
schell, Q.C., was with them), for the appellants: The object of the Legislature was to protect the persons who undertook the construction of piers and docks, so necessary for the benefit of the commerce of the country. The protection was meant to be unrestricted, for if not, there was no necessity for the enactment, the absence of which would have left the constructors of the pier to the protection afforded by the common law. The words of the 74th section were meant to give the undertakers a protection beyond that afforded by the common law, and show in the clearest manner that such protection was intended to be without restriction. The first clause of the section makes the owner of every vessel or float of timber answerable. The enactment is direct, the words plain and positive, and the enactment does not contain any limitation on his liability by any reference to the master being on board or having the management of the vessel or the float, or to his conduct or his capability or skill. The second sentence of the section makes the master or person having the charge of such vessel or float of timber "also" liable, but in his case it does introduce wilfulness or negligence into consideration. The object of the Legislature is plain. The owner is to be liable at all events, and the person having the charge is to be liable in the case of wilful or negligent conduct, but only then. The compulsory presence of a pilot may, under the last clause of the section, relieve the owner; but the fact that that particular matter is thus specially provided for, shows that the general liability of the owner was intended to be most extensive. And it is very reasonable that it should be so, for there may be many cases in which serious injury may be done to piers and docks where, if the constructors of them were left to their ordinary common law remedy for injury caused by acts, whether wilful or negligent, they might be unable to give actual proof of either, and would be left without any protection whatever. [LORD O'HAGAN: Does not the first clause of the section show that it was to be applicable only in the case of the vessel or the timber being under the management of somebody?] There is no mention of that. But even assuming that to be so, it does *not follow that the actual active management or [746

(¹) Law Rep., 8 Q. B., 10.

control of any particular person was intended. A ship may be under the management of somebody without his actually being on board at the moment; but that circumstance is not to deprive the pier constructors of the protection intended to be given them by the act. The case of *Eglington v. Norman* ⁽¹⁾, decided only the other day, shows that to be so.

The meaning of this section of the statute was fully considered in *Dennis v. Tovell* ⁽²⁾, and the court there had no doubt about it. [THE LORD CHANCELLOR: The facts there were not the same.] It is true that there the master and crew were on board at the time, but it was distinctly found that the mischief was not occasioned by their fault but was "inevitable." The general words of the section as to the liability of the owner were therefore applied to the case. The principle stated in *Rylands v. Fletcher* ⁽³⁾ was clearly an authority for establishing the liability of the shipowner, for he brought on to the pier something which would be mischievous if not kept under proper control; he did not keep it under proper control, and the fact that he acted without personal wilfulness or negligence did not exempt him from liability.

It has been contended here that the damage was attributable to the act of God, and that therefore no liability was incurred. But that argument cannot be supported, as against the clear and positive provisions of a statute. Even in the case of a contract, where a contract is made between two individuals, the non-performance of it is not excused by the happening of something which is beyond the control of the person in default. And that must be so still more strongly where a statute (especially for a good public purpose) imposes a liability without any limitation as to incurring it. In *Reg. v. Leigh* ⁽⁴⁾ it was held that a landowner may be liable by prescription to repair sea walls though destroyed by extremely tempestuous weather. In *Nichols v. Marsland* ⁽⁵⁾, it was, no doubt, held, that one who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable for its escape if caused by the 747] act of God or by *vis major*. But *that is a case where the obligation was created by a mere implication of law, and cannot therefore be compared to a statute, where the obligation is, by clear and unequivocal terms, imposed by the Legislature; and here the words of the statute are the stronger, because they are expressly applicable to the facts

⁽¹⁾ 46 L. J. (Ex.), 557.

⁽²⁾ Law Rep., 8 Q. B., 10.

⁽³⁾ Law Rep., 3 H. L., 330.

⁽⁴⁾ 10 A. & E., 898.

⁽⁵⁾ 2 Exc. Div., 1.

of the case. In *The Merle* ⁽¹⁾ it was held, in circumstances like those which exist in the present case, that the shipowner was, under the 74th section of the act, prevented from setting up the defence of unavoidable accident. The authorities upon this point are collected in Broom's Legal Maxims ⁽²⁾. The Legislature plainly intended to extend the common law liability and the common law remedy for mischief done, but that intention would be defeated if no liability should be held to exist here. There was not here any evidence of such an overwhelming power of storm as to excuse the defendants from not doing something else, but even if there had been, that would not take them out of the operation of the plain and express words of the statute.

Sir J. Holker, A.G., and *Mr. Greenhow*, for the respondents: There may be nothing unreasonable in holding the owner of a ship liable for ordinary damage caused in an ordinary way, but the Legislature never could have intended to make him liable for damage occurring when the ship was really no better than a helpless log upon the water, when the master and crew were with difficulty saved from death, and the owner had not any means whatever of exercising any possible control over the vessel. The terms of the section showed that the liability was only to be incurred when some degree of control existed. The object of the section was to secure the liability of the owner in circumstances where, without the statute, it might have been impossible to fix him with liability under the common law. It was, in fact, a regulation of procedure not the creation of a new liability. He was to be answerable, that is, liable to be called on to answer, even though the mischief might not be something that quite amounted to gross negligence or to wilfulness, and though he was not there he was still to be liable in the first instance, for the wilful or *careless [748 act of the master, for which he might not be liable at common law. The real object was, when there was, in fact, a proper title to indemnify, that the pier owner should have somebody that he could at once resort to, without being embarrassed by legal technicalities and difficulties. But there was no proper cause for compensation here. The damage was occasioned by the storm, by the action of the winds and waves, after the men had been with difficulty saved from the wreck, and when no human power had any control over the vessel. Some of the cases cited on the other side had no application to the present. There was no doubt about liability under a covenant to pay rent though the

(1) 2 Marit. Cas., 402.

(2) Page 211 *et seq.*, 3d ed.

1877

River Wear Commissioners v. Adamson.

H.L. (E.)

premises had been destroyed by fire; that had been settled so long ago as *Paradine v. Jane*(¹); *Brewster v. Kitchell*(²); that was the result of a stipulated agreement; but that principle could not be applied to a case where no agreement of any sort had been made, and the liability was entirely the creation of a particular phrase in an enactment which was really a legislative provision of a peculiar and almost private kind.

The case of *The King v. The Commissioners of Sewers for Somerset*(³) showed that though the owners of lands adjoining the sea were bound to repair a sea wall, if that wall was destroyed by a tempest, without any fault on their part, it must be repaired at the expense of the level and not of them alone. In *Nugent v. Smith*(⁴) a common carrier received a mare on board his vessel to be carried to Aberdeen. The weather was very tempestuous—the mare struggled violently, and in the end died. The defendant, though a common carrier, for such was his particular business, a shipowner not necessarily being a common carrier, was held not to have been an insurer against such a misfortune, which had happened through means over which he had no control, and it was distinctly stated that in such a case it was sufficient to prove that by no reasonable precaution could the mischief have been prevented. Here the case was still stronger, and the principle of exemption from liability was therefore still more clear.

Mr. *Shield* replied.

749] *THE LORD CHANCELLOR (Lord Cairns): My Lords, on the 17th of December, 1872, the steamship *Natalian* was attempting, under stress of weather, to enter the Sunderland Docks, belonging to the appellants; while it was still in the open sea, about forty or fifty yards from the pier, it struck the ground, canted with its head to the south, and drifted, bodily, ashore. The crew had been rescued from the ship by means of the rocket apparatus. The tide was low at the time; and as the tide rose, the flood and the storm drifted the ship against the pier and caused damage to the amount of £2,825 13s. The respondents are the owners of the ship, and the question is, whether they are liable to pay this damage to the appellants.

The Court of Queen's Bench held that the owners were liable. The Court of Appeal has been unanimously of opinion that they are not. The question depends upon the true meaning of the Harbors, Docks and Piers Clauses Act,

(¹) *Alleyn*, 26.

(²) 1 *Salk.*, 198.

(³) 8 T. R., 312.

(⁴) 1 C. P. Div., 423.

which enacts that the owner of every vessel, or float of timber, shall be answerable to the undertakers (that is in this case to the appellants), for any damage done by such vessel, or float of timber, or by any person employed about the same, to the harbor, dock, or pier, with certain farther provisions, which I need not at present mention.

The Court of Appeal has been of opinion, and I think rightly, that the injury was not in this case occasioned by the voluntary act or by the negligence of the respondents, or, indeed, of any person on board of, or connected with, the ship; that it could not have been prevented by any human instrumentality; but that it was occasioned by a *vis major*, namely, by the act of God in the violence of the tempest. Founding himself on this, the Master of the Rolls states that it is a familiar maxim of law that where there is a duty imposed or liability incurred, as a general rule there is no such duty required to be performed, and no such liability required to be made good, where the event happens through the act of God or the Queen's enemies, and his opinion is that the court may well come to the conclusion that the act of God and the Queen's enemies were not meant to be comprised within the first words of the section. The Lord Chief Baron states that no man can be answerable, unless by express contract, for any mischief or injury occasioned to another by the act of God. *Lord [750 Justice Mellish states that the act of God does not impose any liability on anybody. Mr. Justice Denman states that in every act of Parliament words are not to be construed to impose a liability for an act done, if the act is substantially caused by a superior power such as the law calls the act of God.

In my opinion, these expressions are broader than is warranted by any authorities of which I am aware. If a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is a duty of a carrier to deliver safely the goods intrusted to his care; but if in carrying them with proper care they are destroyed by lightning or swept away by a flood, he is excused, because the safe delivery has by the act of God become impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state

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of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God. There is nothing impossible in that which, on such an hypothesis, he has contracted to do, or which he is by the statute ordered to do, namely, to be liable for the damages. If, therefore, by the section to which I have referred, it is meant that the owner of every vessel shall, independently of whether anything has happened which would, at common law, give a right of action against any one, pay to the undertakers the damage done by a ship to the pier, I should be unable to see any reason why the payment should not be made in the manner required by the statute.

I cannot, however, look upon this section of the statute as intended to create a right to recover damages in cases where, before the act, there was not a right to recover damages from some one. The section and those which follow it are in an act which collects together the common and ordinary clauses that it was the habit of Parliament to insert in the private bills authorizing the construction of piers and docks. There was no special legislation intended [751] on this head for any particular place or any *particular state of circumstances; and it would be difficult to suppose that by means of ordinary and routine clauses inserted in private or local acts, the Legislature, although it might well provide a ready and simple procedure for recovering damages where a right to damages existed by common law, could intend to create a new right and a new liability to damages unknown to the common law.

By the common law, if a pier were injured by a ship sailing against it, the owner might be liable if he was on board and directing the navigation of the ship, or if the ship was navigated by persons for whose negligence he was liable. But the owner would not be liable merely because he was the owner, or without showing that those navigating the vessel were his servants.

In my opinion, it was to meet this state of the law that this section was introduced. It proceeds, as it seems to me, upon the assumption that damage has been done of the kind for which compensation can be recovered at common law against some person; that is to say, damage occasioned by negligence or wilful misconduct, and not by the act of God. The section relieves the undertakers from the investigation, always a difficult one for them to pursue, whether the fault has been the fault of the owner, or of the charterer, or of the persons in charge. It takes the owner as the person who is always discoverable by means

of the register, and it declares that he shall be the person answerable; that is to say, the person who is to answer, or is to be sued for the damage done. It does not absolve the master or crew, if there has been wilful fault or negligence on their part. They, in that case, may be sued as well as the owner, but if the owner is thus in the first instance made to pay the damage where there has been wilful or negligent conduct on the part of the master or crew, the owner may, under the subsequent sections of the act, recover over against the master or crew; and if the damage has occurred by reason of the act or omission of any other person, if, for example, some one who had hired the ship, sent her to sea insufficiently manned, and the accident occurred in consequence, the owner might apparently under those sections recover from the hirer by reason of this act or omission.

The clause appears to me to be a clause of procedure only, dealing *with the mode in which a right of action for [752 damages already existing shall be asserted, and not creating a right of action for damages where no right of action for damages against any one existed before.

This makes the part of the section relating to the employment of a pilot intelligible and consistent with the rest of the enactment. If a licensed pilot is in charge, the owner is not discharged from a possible liability, but everything is left as it would be at common law. If a pilot was in charge of a ship and the owner was at the same time the master navigating the ship, and did an act which caused damage, he would be liable at common law, and the act leaves him so; but, in the same case, if, while the pilot was in charge and the owner was navigating the ship, the ship became unmanageable by tempest, the owner would not be liable.

I therefore think, although I do not concur in the reasoning of the learned judges of the Court of Appeal, that their conclusion was right; and that the appeal ought to be dismissed with costs.

LORD HATHERLEY: My Lords, I must candidly say that this case has given me much anxiety, and I have felt very great doubt and difficulty as to the proper interpretation to be given to this clause, which is, as it appears to me, somewhat inartificially framed. I cannot concur in the views expressed in the court below by some of the learned judges, on the one hand that the damage which was done in this particular case having been caused by what is commonly said to be an accident, but is called in the language

technically used in law courts, the act of God, namely, a storm, the owner of the vessel would be excused by the section of the act of Parliament, however construed, from the consequences of that mischief. Neither can I think, on the other hand that, as has been held by others of the learned judges in the court below, the clause in question refers only to cases where a vessel is in charge of somebody. I do not think, in the first place, that the grammatical construction of the clause will admit of that solution of our difficulties.

The words are these, "The owner of every vessel, or float of timber, shall be answerable to the undertakers for any damage done by such vessel or float of timber," there is no 753] reference there *to anything but the simple fact of the existence of a vessel, or float of timber, which has created damage, nothing is said about its being in charge of any one or not; but then the clause proceeds, with a disjunctive, to say "or by any person employed about the same, to the harbor, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel" (now for the first time you arrive at that personage) "or float of timber through whose wilful act or negligence any such damage is done, shall also be liable to make good the same. And the undertakers may detain any such vessel, or float of timber, until sufficient security has been given for the amount of damage done by the same," and then comes a special exception in a case where a pilot is compulsorily employed.

When we look at the whole construction of the clause, it appears to me that it speaks in the first place of damage done by a vessel without regard to any one being on board or not; then it speaks in the second place of damage done by any person employed about the vessel; and then it says that the master or person in charge of a vessel is to be liable if damage is done through his wilful act or negligence; and then the excepted case occurs of the pilot, because he had been compulsorily, and against any power of resistance on the part of the owner, placed on board and in charge.

Now, my Lords, we have to see whether or not damage arising from the act of God, that is to say in the particular case a tempest, should be held to be excepted. There might be other cases which would be similar to this of a tempest; the vessel might have been driven on the pier in some other way, or have been injured and become unmanageable by lightning or the like. However it occurred, if the pier was damaged by the vessel in the way which was called by the learned judge in the court below the act of God, is there

anything in the act of Parliament to say (and this clause seems to contain all that is said in the act about it) that the owner of the vessel shall not be responsible for the damage, but that there shall be an exception in respect of damage so caused?

One can easily conceive that the Legislature might think it desirable that those who provide this great accommodation for the *navigation of the country, those who [754 provide harbors of refuge and the like, which are greatly wanted in many parts of the coasts of the United Kingdom, should be indemnified against the possible damage which may accrue to their docks, or to other works which they construct in discharge of the duties in question, and in the exercise of those powers which they have for making docks and other works. Those promoters might say, We offer protection to the public at all times, only, in consideration of the benevolent hospitality which we so afford, protect us from having our works damaged. There is nothing, as it appears to me, utterly unreasonable in such a proposition reasonably carried out. It is quite true that many cases put by the learned judges in the court below, are cases in which it would seem to be a very rigid enactment indeed that damage to a very large and extensive amount, exceeding the value of the vessel itself, should be compensated by the persons whose vessel has done this damage, being made answerable to make it good to the full amount of the damage done, which might even go to the destruction of the principal works, and might therefore result in the ruin of those persons whose vessel had been so forced against them. But, on the other hand, if there was any intention at all of giving a relief of this kind, which must be sought of course in the words of the act, then I apprehend that the exception of a storm or tempest would be a very singular one, because it is a probable case to happen. There are, no doubt, many other ways in which damage might be done, but it is amongst the very probable causes that a storm or tempest should be the thing which would occasion the damage through the medium of the ship which directly produced that damage. I do not think, therefore, that I can say at all satisfactory to my own mind, that, provided that the act itself is clear and specific in its clauses, the party who caused the damage could be exempted because the damage was the result of a tempest and not of what is ordinarily called his fault. Neither, as I have already said, by the grammatical construction of the clause, do I think that the

clause is only to be applied in cases where some master or other person is in charge of the vessel.

Possibly the expression of the late Lord Justice Mellish may come nearer to the mind of the Legislature, and any 755] view of his *I look to with the deepest and most unfeigned respect. His notion of the general intent of the clause is this: that it points to something in which man is concerned—I think that is his expression—that is to say, in which human agency intervenes, and it was on that ground that he coincided with the views taken by the other learned judges. His idea of the whole intent and purport of the clause was, not that the act of God was wholly to excuse the person liable under the enactment, if that liability once existed, but that the clause pointed to some act of man which was to take place, and not to a mere casualty occasioned by the tossing and driving about of the vessel from the effect of a storm upon the sea.

My Lords, finding that I cannot concur in the reasons given in the court below, of course I have to consider the construction of the clause. I think that taking the view which was taken by the appellants in this case, the clause has been framed with probably extraordinary pressure and severity against the persons by whose vessels this damage would be created. No one can possibly deny that; and that severity seems to have induced some of the learned judges before whom the case has come, to think that it is impossible to attribute such an intention to the Legislature. Now I am afraid that it does sometimes occur, that an act of the Legislature cannot be carried out without very great inconvenience and hardship, but that is not because the Legislature intended it, but because the possibility of its occurrence has been forgotten. I think that such a circumstance may have occurred here, and produced the enactment that we have before us.

However, it is the opinion, I believe, of the majority of your Lordships that, on the whole case being considered, this is not a case that we can regard as struck at by this clause. Whether the ground to be assigned for that is the view which has been expressed by the noble and learned Lord who preceded me, and of whose opinion I speak with the highest respect, or whether any view may be adopted by any of your Lordships similar to that taken in the court below, leading to the conclusion that the damage which here occurred is not brought within the meaning or purview of this act, I shall not pause to inquire. There being this doubtfulness of opinion, I shall not do what I might prob-

ably *under other circumstances have thought it [756 my duty to do in this case. I am unwilling to do anything farther than to say that I cannot concur in the opinion expressed by my noble and learned friend on the woolsack otherwise than with extreme doubt and hesitation.

LORD O'HAGAN: My Lords, I need scarcely say that this is a difficult and embarrassing case. The various views which have been adopted by able judges make this fact plain, and I hardly think that any conclusion to which we can arrive will be completely satisfactory.

The difficulty arises from the form of the short clause we are required to interpret. Your Lordships, exercising your appellate jurisdiction, act as a court of construction. You do not legislate, but ascertain the purpose of the Legislature; and if you can discover what that purpose was, you are bound to enforce it, although you may not approve the motives from which it springs, or the objects which it aims to accomplish.

Our daily experience demonstrates that the task of construction, so understood, is not an easy one. It sometimes involves the necessity of harmonizing apparently inconsistent clauses, and making homogeneous provisions cast together, haphazard, by various minds, differently constituted and looking to different and special objects, without due regard to the harmony of the whole. I have often thought that our legislative arrangements need much revision in this regard, and that, if it were possible, a department should be instituted by which bills, after they pass committee, might be supervised and put into intelligible and working order, and then submitted for final revision to Parliament before they pass into laws. But in the meantime we must deal with things as we find them, and reach, if we can, the true meaning of the confused words with which we often have to deal.

Undoubtedly, if the first division of the 74th section of the Harbors, Docks and Piers Clauses Act, 1847, stood alone, it would seem to cast upon the owner, under all possible circumstances, liability to the undertakers for any damage done by his vessel. That was the view reluctantly adopted by the court of Queen's Bench, which we are asked to affirm in opposition to the *judgment of the Court of Appeal. [757 And if your Lordships, on a full consideration of the whole clause, are satisfied that it was the view intended to be carried out, you have no alternative but to act upon it. No speculation as to the inconvenience, or even the injustice, which it may accomplish, no consideration of the admitted

innocence of the owner of the vessel, or of the inevitable nature of the accident which wrought the injury, would justify a refusal to interpret the statute according to the design of the makers of it. And if you clearly see that they meant the liability to be unqualified and universal, you are not at liberty on such grounds to defeat that design, and say that the appellants shall not have the benefit of it. If the law, as it stands, is oppressive or inequitable, the Legislature, which devised it, can alone reform it; and certainly, in my judgment, should your Lordships feel yourselves obliged to reverse the ruling of the Court of Appeal, such a reform will be needful and should be promptly made.

For, my Lords, the results of such a reversal seem very serious. It would involve the obligation of an owner to make good damage done by his ship, although, as in this case, he might be free from blame for any imaginable wrong by himself or his servants, or in any other way. If, necessarily abandoned on the high seas a thousand miles away, the ship drifts ashore after long wandering, and does an injury, or if, taken out of his hands absolutely by a pirate or an enemy, it is brought in his absence, and against his will to attack the coast of England; or if, as was put by the judges of the Appeal Court, the undertakers themselves should have got hold of the owner's vessel and employed it so as to injure their own pier,—in all these cases and in others easily to be conceived, he would be responsible for results to which he had not contributed.

Now, no doubt, it is possible that the Legislature may have contemplated, for the protection of harbors, docks, and piers, an enactment fraught with consequences of this description; but, before we attribute to it so strange a purpose, we are bound, I think, to see whether the phraseology it has used, taken altogether, does not enable us to reconcile its action with common sense and common justice, and 758] to say that, although it has spoken *obscurely, it has not made unavoidable such a very startling construction of its words.

The case before us is not, perhaps, quite so shocking as those which have been just supposed as tests of the effects of this piece of legislation. But, certainly, it does seem hard that the respondent, having had his ship so injured by the winds and waves on the high seas that its crew, to save their lives, abandoned it, and it was derelict, and was forced by the storm against the pier, should not only have lost its value, £10,000,—save in so far as it was insured,—but, in addition, nearly £3,000 for mischief done admittedly with-

out fault of his and by the act of God. We must take care that a hard case shall not make a bad law; but we must also take care that we do not attribute to Parliament the intention of injustice so very flagrant, without coercive necessity.

Now, I have come to the conclusion, although not without serious hesitation and misgiving, that there is no such necessity, and that, well considered, the statute is not applicable in the peculiar circumstances before us.

I do not propose that your Lordships should act on any large application of the old maxim, "*Qui hæret in literâ, hæret in cortice*," or refuse, from any assumption of error in policy on the part of the Legislature, to give effect to the literal meaning of the act. But, when we pass from the first clause of the section, and find it dealing with "the master or person having the charge of *such* vessel," I think it is indicated that "*such* vessel" may be taken to limit the description of "*every* vessel" in the preceding phrase, and to confine the liability of the owner to vessels "in charge" of a master or somebody else. I do not see how we are to give effect to the word "*such*" otherwise than by qualifying the generality of the preceding language, and holding, with Lord Justice Mellish, "that the section points to something done by the act of man, or to the act of the person in charge."

The terms of the statute appear to me fairly to bear this interpretation; and, if they do, it is manifestly more in accordance with reason and probability than that which is opposed to it. In any view, the provision is hard upon the owner, and puts him in a worse position than he would have held at common law. But, *there is something [759 comparatively tolerable in the notion that he shall be responsible, if accident occurs when his captain, or some one else employed by him, acting for him, and under his control, has, at least, the chance of avoiding it. When this chance is gone, because his servants cease to be in charge, and his ship becomes an ungoverned log, irresistibly borne against a pier, without the possibility of check or guidance, the hard measure of liability for an act which is not his or his agent's, should not be imputed to him, if there is fair ground for thinking that the section did not contemplate such a state of circumstances. In the one case, it may be just that the owner should answer, if the injury arises from the actual or presumed default of his servants, and it may be politic to make him careful in the selection of them, from an apprehension of the consequences of such an actual or

presumed default. On the other, his utter and necessary powerlessness to avert the mischief should make us slow to say that he was meant to answer for it.

Then, as to the proviso, it appears to be reasonably explicable on the one construction, and not on the other. If it was meant that the owner should be universally liable, whether or no any control remained with him or with his crew, how can we account for the exception as to the presence of the pilot? The injury is the same, the instrument of the injury is the same; and why, if the liability is to arise, without any regard to circumstances, in all other cases, although every possibility of control or default is absent, why should the pilot's compulsory employment exonerate the owner? On the other hand, if the true construction makes him only liable when a master or some other freely chosen by himself, and on his own responsibility, is in charge, we can see good reason for the exoneration as soon as the pilot, whose retainer is not optional, as in the case of his own people, assumes the care of the ship, and so disables him from meddling with it, directly or indirectly. In the one case there is some control remaining with him, in the other there is none. The law displaces the person he had chosen to guide his vessel, and he is made irresponsible. Why should he not be so, when the stress of the storm has the same effect, and forces his captain and [760] his crew to abandon the trust he *had committed to them? The proviso appears to me persuasively to sustain the argument of the respondents.

It has been said that unless the appellants prevail the statute must have failed of its object—which was manifestly the greater protection of the pier owners—because it gives them nothing which they had not at common law. I think that this is a fallacy. At common law, there were serious questions continually arising, which, on either construction of the statute, can arise no more. Often it was doubtful on whom liability should be charged, or by what evidence the charge of it could successfully be sustained. We can well conceive that the undertakers might have found difficulty in properly selecting a defendant, amidst the varying circumstances which affect the direction and management of merchant vessels, and the proof, establishing responsibility, must often have been hard to find, and inadequate to satisfy a jury.

I do not know the exact history of the legislation, but, in this state of things, the undertakers may, perhaps, have reasonably complained that, having performed great public

service in forming a harbor, a dock, or a pier, they found themselves unable to recover for injuries confessedly done to works accomplished with much expense and labor, and of the utmost importance to the commerce of the country. And the Legislature may have fairly said, that greater protection was due to them than they derived from the law which had grown up before that commerce and those works had been created, involving the necessity of safeguards theretofore uncalled for and unknown. Accordingly, the Legislature made the owner—a person easily and always to be found—"answerable," *as* owner, and dispensed with the proof of negligence or any other proof, save of the fact of injury by the vessel—in all the cases contemplated by the act. This was a great change, and a great addition to any security which the undertakers enjoyed at common law; and it was so, whether we give the clause the universal force for which the appellants contend, or the more restricted application, which, with the Court of Appeal, I think your Lordships ought to attribute to it. And, in addition, a farther material advantage, unknown to the antecedent law, is afforded to the undertakers, who are empowered to detain *the vessel or float of timber* [761 "until sufficient security has been given for the amount of damages done by the same."

These most important provisions plainly supply the motive for the legislation, whatever be the issue of the controversy as to the extent of its action; and I think it is vain to allege that we cannot suggest for it a sufficient motive, without straining its effect to work confessed injustice.

I do not stay to consider the argument that this construction, approved by the Court of Appeal, should be rejected, because a float of timber is not usually "in charge" of any one, as a vessel is, and that Parliament cannot, therefore, be supposed to have restricted its view to cases in which the instrument of injury is derelict. The first answer is, that floats may be and are often "in charge," not, perhaps, of such a "master" as governs a vessel, but of other persons such as the statute takes care to mention. I do not think that they are so guarded only on the Rhine and the Danube, where populations live upon them. And next, the statute deals with the vessel and the float of timber, *quoad* the "charge" of them, precisely in the same way, and the observations I have made as to the first will, if they have force, be equally applicable to the second.

Lastly, my Lords, you may have noted that my reasoning has not been precisely that of the Court of Appeal, and

that I have not based it altogether upon the legal doctrine as to the act of God. That doctrine is founded on the view, which commends itself alike to equity and reason, that liability should not be imposed, unless in special circumstances, or where public interests imperatively require it, for consequences which are not wrought by human will or act, and for which no human being is morally responsible. There are exceptions to its application, as when a man voluntarily contracts, with full opportunity of anticipating possible results, to do that from doing which he may be disabled by inevitable accident; or when, as is said, the repairing of sea walls is rendered imperative by prescription, notwithstanding inevitable accident; and in various other cases.

And I am not at all prepared to say that the Legislature has not full power, if it be so minded, to declare that a proceeding it forbids, or a proceeding it commands, shall not 762] be justified—in the commission of the one or the omission of the other—because the result was caused by the act of God. A law so providing we should be bound to enforce: and if, in the case before us, the statute was universally applicable, as the appellants contend, the unhappy shipowner must have submitted to its hard infliction. As I have said, I think that it is not so applicable, and that, in his circumstances, it does not apply. And it seems proper to suggest that we should not—upon any phraseology of a doubtful character, or without the clearest and most unequivocal expression of legislative intention, or if we may anyway reasonably interpret that intention in another sense—assume that a maxim so ancient, so well established, and so accordant with the moral sense of mankind, has been set at naught by the statute before us.

In the view I have presented to your Lordships, the only case cited as touching the present (*Dennis v. Tovell* ⁽¹⁾) has no application to it. There, the vessel was not derelict, and the owner may have properly been held liable. Here, on the other hand, in the words of Baron Pollock,—“Out on the high seas she met with certain risks and injuries which compelled her crew to leave her, and she became derelict.” And, in my judgment, this ship should be dealt with as if it had been abandoned at the antipodes, and had been ploughing the ocean, without a crew, for years before it was driven against the pier at Sunderland.

On the whole, I think that the judgment of the Court of Appeal should be affirmed, and the appeal dismissed.

(¹) Law Rep., 8 Q. B., 10.

LORD BLACKBURN: My Lords, I have had very great doubt and hesitation in this case, and have, while considering it, changed the opinion I at first held.

The question raised depends on the true construction of three sections of the Harbors, Docks and Piers Clauses Act, 1847, 10 Vict. c. 27, namely, sects. 74, 75 and 76. These are part of a set of clauses gathered together under one head, viz., "Protection of the Harbor, Dock and Pier, and the vessels lying therein, from fire or other injury." I do not think any other clause in the act throws light on the construction of those sections; nor do I think that the [763] construction put upon these sections will have any legitimate bearing on the construction of sections in other parts of the act, such as sect. 56, contained in the clauses relating to the powers of harbor, dock and pier masters, though no doubt the principles of construction of statutes laid down by this House in the present case must have an important effect on those who have to construe that or any other enactment.

My Lords, it is of great importance that those principles should be ascertained; and I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the courts of law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used. I do not know that I can make my meaning plainer than by referring to the old rules of pleading as to innuendoes in cases of defamation. Those rules, though highly technical, were very logical. No innuendo could enlarge the sense of the words beyond that which they *prima facie* bore, unless it was supported by an inducement or preliminary averment of facts, and an averment that the libel was published, or the words spoken, of and concerning those facts, and of and concerning the plaintiff as connected with those facts. If those preliminary averments were proved, words which *prima facie* bore a very innocent meaning might be shown to convey a very injurious one, and it was for the court to say whether, when used of and concerning the inducement, they bore the mean-

ing imputed by the innuendo. See the notes to *Craft v. Boile* ('). The Legislature has rendered it no longer necessary to set out on the record the facts and the *colloquium* necessary to support an innuendo; they are now only matter of proof on the trial; but the principle remains.

764] *In construing written instruments I think the same principle applies. In the cases of wills the testator is speaking of and concerning all his affairs; and therefore evidence is admissible to show all that he knew, and then the court has to say what is the intention indicated by the words when used with reference to these extrinsic facts, for the same words used in two wills may express one intention when used with reference to the state of one testator's affairs and family, and quite a different one when used with reference to the state of the other testator's affairs and family.

In the case of a contract, the two parties are speaking of certain things only, and therefore the admissible evidence is limited to those circumstances of and concerning which they used those words: see *Graves v. Legg* ('). In neither case does the court make a will or a contract such as it thinks the testator or the parties wished to make, but declares what the intention, indicated by the words used under such circumstances, really is.

And this, as applied to the construction of statutes, is no new doctrine. As long ago as *Heydon's Case* (') Lord Coke says that it was resolved "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered; 1st. What was the common law before the act? 2d. What was the mischief and effect for which the common law did not provide? 3d. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? And 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy." But it is to be borne in mind that the office of the judges is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the court injudicious; and I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an

(') 1 W. San., 246 b.

(') 9 Exc., 709.

(') 3 Co. Rep., 7 b.

absurdity or inconvenience so great as to convince *the [765 court that the intention could not have been to use them in their ordinary signification, and to justify the court in putting on them some other signification, which, though less proper, is one which the court thinks the words will bear. In *Allgood v. Blake* (¹), in the judgment of the Exchequer Chamber (which I had the honor to deliver), as to the construction of a will, it is said: "The great difficulty in all cases is in applying these rules to the particular case; for to one mind it may appear that an effect produced by construing the words literally is so inconsistent with the rest of the will, or produces an absurdity or inconvenience so great, as to justify the court in putting on them another signification, which to that mind seems a not improper signification of the words; whilst to another mind the effect produced may appear not so inconsistent, absurd, or inconvenient as to justify putting any other signification on the words than their proper one, and the proposed signification may appear a violent construction. We apprehend that no precise line can be drawn, but that the court must, in each case, apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not adhering slavishly to them when to do so would obviously defeat the intention which may be collected from the whole will." My Lords, *mutatis mutandis*, I think this is applicable to the construction of statutes as much as of wills. And I think it is correct.

My Lords, in local and personal acts there was found to be great inconvenience from the clauses being framed according to the views of the promoters' counsel, and, consequently, being very differently worded, and to remedy this a practice arose, I do not know when, but I believe about forty years ago, of obliging the promoters to submit their bills to the revision of the chairman of committees, who required them to make their clauses in the form he had approved of, unless some good reason was shown for deviating from it. These forms of clauses were well known, and from the name of the noble lord who had originated them were called Lord Shaftesbury's clauses. The research which my noble and learned friend opposite (Lord Gordon) has made shows that in the Harbors Acts, passed in 1846, the common form of *the clause used was in the words of [766 what is now sect. 74 of the Harbors, Docks and Piers Clauses Act, 1847, but (except in one instance) without a proviso similar to that at the end of it. That shows, what

(¹) Law Rep., 8 Ex., at p. 163.

the frame of the section would have led one to guess, that the proviso was an afterthought added to the enactment after it had been adopted. The preamble of the Harbors, Docks and Piers Clauses Act declares that it is passed for the purpose of comprising, in one act, the clauses usually contained in Harbor and Pier Acts, for the purpose of avoiding prolixity and producing uniformity. And the clause in question is one of a series for the "protection of the harbor, dock and pier, and the vessels lying therein, from fire or other injury."

The first inquiry for your Lordships is, are we justified in putting a different construction on the words of an act passed at the instance of particular promoters (or, as it is commonly called, an act local, personal, and public) from that which would be put on similar words in a general act. To some extent I think we are. If in a local and personal act we found words that seemed to express an intention to enact something quite unconnected with the purpose of the promoters, and which the committee would not (if it did its duty) have allowed to be introduced into such an act, I think the judges would be justified in putting almost any construction on the words that would prevent its having that effect. But I do not think it impossible that the Legislature can have intended in such an act to create a new liability to damages unknown to common law. The creation of such a liability would be in direct furtherance of the declared object of the enactment, the protection of the piers from injury. And, on every construction of the enactment in question which I have heard suggested, the Legislature does impose on the owners a liability for damages occasioned by persons for whom they would not be liable at common law. At present, I cannot see my way to limiting the words in this act, more than in a general act; but I think that, neither in a general nor a special act, could the Legislature have meant (if the words were at all understood) to shift the burthen of a misfortune befalling the owner of the pier, from the owner of the pier, who at common law would bear it, to the owner of a ship wholly free from blame, and involved, without fault of his, in a common 767] *misfortune. It may have been said, but can hardly have been intended to be said.

My Lords, the common law is, I think, as follows: Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road,

and a pier adjoining to a harbor or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good. And he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner.

But he does establish such a liability against any person who either wilfully did the damage, or neglected that duty which the law casts upon those in charge of a carriage on land, and a ship or a float of timber on water, to take reasonable care and use reasonable skill to prevent it from doing injury, and that this wilfulness or neglect caused the damage. And, if he can prove that the person who has been guilty of either, stood in the relation of servant to another, and that the fault occurred in the course of the employment, he establishes a liability against the master also. In the great majority of cases the servant actually guilty of the negligence is poor, and unable to make good the damage, especially if it is considerable, and the master is at least comparatively rich, and consequently it is generally better to fix the master with liability; but there is also concurrent liability in the servant, who is not discharged from liability because his master also is liable. And in a very large number of cases the owner of the carriage, or ship, or float of timber is, or at least is supposed to be, the master of those who were negligent, and consequently the action is most frequently brought against the owner, and is very often successful. But the plaintiff succeeds, not because the defendant is owner of the carriage, or ship, or float, but because those who were guilty of the negligence were his servants.

My Lords, I have described this state of the law with what is almost pedantic particularity, because I think it important to have *it clearly before us. What I have said [768 is really a statement of the law as laid down by Parke, B., in delivering the judgment of the Exchequer in *Quarman v. Burnett* (¹), where the plaintiff was nonsuited because the defendants, though owners of the carriage, and actually seated in it at the time of the accident, were not the mistresses of the coachman whose negligence caused the accident.

My Lords, I have already said, that in the ordinary course of things, those employed about a ship are the servants of the owners, and in *Hibbs v. Ross* (²) the majority of the Court of Queen's Bench thought this was so much the

(¹) 6 M. & W., 499.

(²) Law Rep., 1 Q. B., 584.

case, that proof of ownership in the defendant was *prima facie* evidence that they were his servants, calling on him to prove an exceptional state of things showing them not to be his servants. A case very likely to occur in a harbor, in which this would be disproved, would be where the ship was put in the hands of a shipwright to be repaired, and the shipwright's servants in moving it into a graving dock negligently did mischief. The owner would not there be liable at common law. Where the owner of a ship is compelled to take a pilot on board, that pilot is not the servant of the owner, who is not liable for the negligence of that pilot; but the captain and crew remain his servants, and he is liable for their negligence, though a pilot is on board. Where no one is to blame, as where the accident is occasioned by inevitable accident, the loss at common law was borne by the owner of the property injured. And, lastly, the person injured has at common law no lien on the ship, but only a right of action against the person to blame, and also, if he was a servant, against his employer.

My Lords, reading the words of the enactment, and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the Legislature was to give the owners of harbors, docks, and piers more protection than they had. It seems to have occurred to those who framed the statute, that in most cases where an accident occurs, it is from the fault of those who were managing the ship—and in most cases those are the servants of the owners—but that these were matters which in every case must be proved, and consequently that there was a [769] great deal of litigation incurred before *the owner, though he really was liable, could be fixed: and with a view to meet this, the remedy proposed was that the owner, who was generally really liable (though it was difficult and expensive to prove it), should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be "answerable for any damage done by the vessel or by any person employed about the same" to the harbor. It seems to have been suggested that where a compulsory pilot was on board the mischief might very well be by his fault, and then the previous general presumption that mischief generally was due to the fault of the owners' servants, did not arise. This case, therefore, was, by the proviso, taken out of the enactment and restored to common law. As to the possible case of the mischief being oc-

casioned by the servants of a shipwright, or some other substantial person, it seems to have been thought enough to give the owner the remedy over provided by the 76th section. As to the cases in which the fault was that of some person not able to make compensation, for whom the shipowner was not at common law responsible, it may have been thought that the cases would occur so seldom, or when they occurred would probably be of such small amount, that the shifting of the loss from the owner of the property to the owner of the ship was not too high a price to pay for the saving of litigation and expense. The cases of a common misfortune befalling both ship and pier, without fault of either, seem not to have been thought of. At all events, no exemption or proviso to take these cases out of the general enactment is given in express words.

My Lords, on reading the words of the enactments, I am brought to the conclusion that such was the scheme of legislation adopted by Parliament; the mischief being the expense of litigation; the remedy that the owners should be liable without proof of how the accident occurred. And if it had but been confined to cases in which the damages were under £50, and might be recovered before two justices as under sect. 75, I think it would be a scheme of legislation against which no very serious objection could be raised.

**Dennis v. Tovell* (1) was a case under £50, raised [770 in the county court and brought by appeal before the Court of Queen's Bench. Without bestowing so much consideration on the case as I have now done, I joined in the judgment of the court, which I for a long time have thought right, and which I now dissent from with great doubt and hesitation. It is impossible, however, to put any limit on the amount. The shipowner, if liable at all under this statute, is personally liable to his last farthing for the whole damage, however great, and however small may be the value of his ship. In the present case the amount is £2,825, and if the statute transfers the liability for so large a sum from the plaintiffs, to the defendants who have done nothing wrong, there is no doubt it is a hard case on the defendants. There is a legal proverb that hard cases make bad law; but I think there is truth in the retort that it is a bad law which makes hard cases. And I think that before deciding that the construction of the statute is such as to work this hardship, we ought to be sure that such is the construction, more especially when the hardship affects not only one individual but a whole class.

(1) Law Rep., 8 Q. B., 10.

I have therefore (I do not know if I was justified in doing so) examined the reasons given by the various judges in the Court of Appeal, with a wish to find that some of them would in my mind justify the conclusion to which they have come in favor of the defendants. And I have tried to find some ground which had escaped their notice, on which I could advise your Lordships to uphold that decision, but for a long time without success.

It is quite true that where a duty is imposed by law, if the performance of the duty is rendered impossible by the act of God, or the King's enemies, the non-performance of the duty is excused. *Paradine v. Jane* (¹), which is the case generally cited for that position, is one in which the point did not arise. Prince Rupert and his cavaliers, if they were to be considered the king's enemies, by driving away the defendant's cattle and burning his crops, may have reduced the defendant to poverty, but did not render the payment of his rent to his landlord impossible in any other sense than they rendered the payment of any other debt to any other creditor impossible; nor in the present [771] case is there any *impossibility in the owner making good the damage caused by the act of God, any more than if caused otherwise. The case of *Paradine v. Jane* (¹) was one in which it was attempted to argue that the duty imposed by the contract to pay rent was subject to a condition that the tenant should not be evicted by the act of God, or *vis major*, and the really important part of the decision is that where a contract is made which does not either expressly or impliedly except the act of God, the courts could not introduce that exception by intendment of law; and that makes strongly against the supposition that, in construing a statute where the Legislature might have expressed, but did not express, such an exception, the court should introduce it. And there is no case cited, and as far as I can find no case exists, in which such a doctrine is laid down. In *Latless v. Holmes* (²), where an act which was to "take effect from the passing of the act" received the royal assent in May, it was held, by fiction of law, to relate back to the first day of the session, in the previous October, and to apply to a transaction occurring between October and May. This was contrary to two legal maxims, that a fiction of law should never be used to work injustice, and that the law compels no one to do an impossibility; but the words of the enactment were too plain, and the court was obliged to work, not only great hardship, but, in the particular case,

(¹) *Alleyne*, 26.

(²) 4 T. R., 660.

great injustice. And in the present case, if the object of the statute be, as Mr. Baron Pollock says, and as I think it is, with a view to avoid expense and delay, that the owners of the dock are not to be put to the proof of negligence, or to the proof of how the injury was occasioned, that object would be to some extent less effectually carried out by importing such an exception, which is certainly not expressed in terms.

Still there remains the question whether the hardship produced, and the injustice worked, is so great as to justify the court in putting any meaning on the words which they will bear in order to avoid it. Both the late Lord Justice Mellish, and, as I understand him, the Lord Chancellor, have thought that the words may be construed so as to make the owner of the ship answerable only for damages occasioned by the act of man; damages for which some one is answerable at common law.

*I have already said that the question whether [772 words can bear a secondary sense different from the usual one, is one on which different minds differ. In the present case I feel no doubt that the hardship is great enough to justify putting a considerable strain on the words to avoid it; for I feel certain that if the enactment has the effect of shifting the burden of a misfortune to the piers from the owners of the property, who at common law would have borne it, to the owners of the ship, who are free from all blame, it is an unforeseen consequence of the words used, which words, if the consequence had been foreseen, would not have been used in the enactment.

My Lords, I cannot see anything in the language of the act to justify what was the opinion of some of the judges of appeal, and is, I think, adopted by Lord O'Hagan, that it is confined to cases in which some one is in charge of the ship, even if that exception could save the defendants, which I do not think it would. The defendants were by their servants in possession of the ship when it drove on the bank. It did not strike the pier till the rising tide floated it in, but it was all one transaction, and when it struck the pier it was still a ship, and the defendants were still its owners. It is not necessary to inquire when or under what circumstances that which was once a ship becomes a mere "congeries of planks" to which the statute would not apply, farther than to say this ship cannot be treated as having become such, nor was it in my opinion in any sense a derelict.

My Lords, after much hesitation and doubt, I am not prepared to say that this judgment should be reversed. I am not prepared to say that the words "damage done by

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the ship," as used in this enactment, necessarily include all expenses occasioned by misfortunes in which the ship was involved in common with the piers. Lord Justice Mellish, for whose judgment I have always had a degree of veneration which his lamented death permits me to express more freely than I should think seemly if he still lived, seems to have thought that these words might bear the more restricted sense of *injuria cum damno*. The declared object of the enactment is the protection of the piers, &c., from "injury," which renders this construction a little less violent than if the object had been expressed to be to protect the 773] harbor authorities *from "loss." If they can bear that sense, we ought to construe them so; and though I have had, and have, great doubt whether this is not too violent a construction, I am not prepared to reverse the judgment based on it; and consequently I agree that the appeal should be dismissed with costs.

LORD GORDON: My Lords, the opinion which I have formed in this case differs from that at which the majority of your Lordships and the Lords Justices of Appeal have arrived. I incline to the opinion of the Court of Queen's Bench. Having regard to the great weight due to the opinions which have been expressed by your Lordships, and also to the great weight due to the opinions of the Lords Justices of Appeal, both in their collective and in their individual capacity, I feel much distrust in my own opinion. But I have considered the case with great anxiety, not only in consequence of the views entertained by your Lordships, but also in consequence of the case involving the construction to be put on a section of an act of Parliament—a matter which it is of importance should not be subject to conflicting views founded upon supposed expediency, and I feel that it is my duty to explain more fully than I should otherwise do, the grounds upon which I venture to dissent from the opinions which have been expressed by your Lordships, although I am aware that my doing so will have no practical effect upon the decision of this case.

The question relates to the application of the provisions of an act passed for consolidating certain provisions usually contained in special acts authorizing the making and improving of harbors, docks, and piers. It is a British statute applicable to Scotland as well as England; and its provisions are of much importance. Indeed we have been informed that a question has arisen connected with a pier in Scotland, in a case before the Common Pleas Division, *Eglinton v.*

Norman (¹), depending upon the construction of another section of the act (the 56th), involving a large sum of money, which is likely to come before your Lordships on appeal, although that case will not necessarily depend upon the judgment to be pronounced in the present case.

*The question in this appeal arises out of the leading enactment of the 74th section, which provides that "the owner of every vessel, or float of timber, shall be answerable to the undertakers for any damage done by such vessel, or float of timber, or by any person employed about the same, to the harbor, dock, or pier, or the quays or works connected therewith;" and then it farther provides that the master, or person in charge, shall also, in cases of negligence, be liable; and that the undertakers may detain the vessel causing the damage till security be given to make good the damage; and it also provides "that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall, at the time when such damage is caused, be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of."

The leading enactment of the 74th section is general and express, that the owner of every vessel causing damage to harbors, &c., shall be answerable for such damage, except in the single case where the vessel is in charge of a pilot; and the question which your Lordships have to consider is, whether the words of the section are to be read and applied in their ordinary common sense meaning, or whether there is to be imported into the statute another exception than the express exception it contains, relieving the owner of a ship which at the time the damage occurred was in charge of a duly licensed pilot, an exception, viz., from liability in cases where the damage was caused by the vessel through the act of God, or, as it is sometimes expressed, *vis major*.

It may be mentioned that this 74th section was the subject of construction in the case of *Dennis v. Tobell* (²). That case having involved a sum under £50 was decided in the County Court, but was taken by appeal before the Court of Queen's Bench, who dismissed the appeal with the approval of the Lord Chief Justice Cockburn. That previous decision of the Queen's Bench prevented that court from reconsidering in the present case the 74th section; but leave was granted by their Lordships to take the appeal to the Lords Justices, which led to their Lordships' judgment, the subject of the present appeal to your Lordships' House.

(¹) 46 L. J. (Ex.), 557.

(²) Law Rep., 8 Q. B., 10.

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775] *The exemption from liability on the part of the owner when his vessel is under charge of a licensed pilot, may be, it appears to me, regarded as strengthening the express words of the leading enactment of the 74th clause, in accordance with the brocard, *exceptio probat regulum*.

The first consideration to be attended to in reading the 74th clause judicially, is whether the words of the clause are express, intelligible, grammatical, and unambiguous. I submit for your Lordships' judgment that the leading words of the 74th section have all these characteristics. In my humble opinion the word "answerable" is merely an equivalent for "liable"; and I observe that their Lordships in the Court of Appeal deal with the expression as having that meaning. And no argument was addressed to your Lordships from the bar on the part of the respondents to show that the word was capable of any other construction. I think the section in question itself shows that the words are synonymous. For while it enacts that the owner shall be "*answerable*" it likewise enacts that the owner or person in charge shall "*also* in cases of negligence be *liable*," and then it provides that "nothing herein contained shall extend to impose any *liability* for any such damage upon the owner" where the vessel should be in charge of a pilot.

The next matter for consideration is, what are the duty and the province of a court of law when ascertaining what effect is to be given to the 74th section, which, in my opinion, is of the express and unambiguous character already stated; and in expressing an opinion upon this question your Lordships are at present officiating not in your legislative character, but as the Supreme Court of Appeal, in a judicial capacity.

Blackstone, the highest constitutional and legal authority with reference to the law of England, when treating of statute law, states (vol. i, page 89), "where the common law and a statute differ, the common law gives place to the statute." And again (at page 91), "If the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of 776] them prove that where the main object of a *statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the Legislature which would be subversive of all government." Mr. Justice Byles (in the case of *Birks v. Allison* (')) stated that

(') 13 C. B. (N.S.), 23; 32 L. J. (C.P.), 51.

the "general rule for the construction of acts of Parliament is that the words are to be read in their popular, natural, and ordinary sense, giving them a meaning to their full extent and capacity, unless there is reason upon their face to believe that they were not intended to bear that construction, because of some inconvenience which could not have been absent from the mind of the framers of the act, which must arise from the giving them such large sense." Chief Justice Jervis (in the case of *Abley v. Dale* ⁽¹⁾) stated, "If the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning." Mr. Justice Cresswell (in the case of *Biffin v. Yorke* ⁽²⁾) states, "It is a good rule in the construction of acts of Parliament that the judges are not to make the law what they may think reasonable, but to expound it according to the common sense of its words."

In a recent case before your Lordships' House, *Hutton v. Harper* ⁽³⁾, where the construction of a statute incidentally arose, Lord O'Hagan said: "The argument from inconvenience is not to be lightly entertained, and never for the purpose of construing a statute which is clear in its terms, and indicates, unmistakably, the purpose of the Legislature. When the words are obscure, and the purpose therefore more or less doubtful, it may help to a right understanding of them."

The Lords Justices of Appeal, without stating that the leading enactment of the 74th section is not express, or is even ambiguous, gave effect to the present respondents' contention that the statute must be read as if it contained an express provision that the liability for damage should not attach to the owner, where the damage had been caused by what is called the act of God, which in the present case means stress of weather. Their Lordships proceeded upon the ground that such an exception applies to all cases where a duty is imposed, unless expressly included; and they hold that the same rule was applicable to acts of Parliament; and farther, that it could not have been the inten-

(1) 11 C. B., 391; 21 L. J. (C.P.), 104. (2) 1 App. Cas., 464, at p. 474.

(3) 6 Scott, N. R., 235; 12 L. J. (C.P.), 162.

tion of the Legislature, with reference to the statute in question, to impose what their Lordships regard as an unjust liability upon owners guilty of no fault or negligence. But, my Lords, no authority has been referred to, either by their Lordships or in argument from the bar, warranting the introduction of such a qualification; and after a careful search I have been unable to find any, either in the law of England or of Scotland. It has been argued by the respondents in the appeal, that the introduction of such an imposition upon owners of liability must be qualified by the implied condition freeing them from such liability where the damage was occasioned by the act of God, in order to give what is called a reasonable construction to the statute itself.

With regard to the supposed intention of the Legislature to express the terms of the act subject to the implied condition, I may observe that Lord Justice Mellish⁽¹⁾ said: "I think, taking the language of the section, it clearly was the intention of the Legislature to extend the liability of the owners of vessels, in favor of the owners of piers and harbors, beyond the liability which is imposed on them by common law, because if that is not the intention, it is not easy to see the object of the section at all." This is very high authority for presuming, in so far as it may be relevant or competent to do so, what was the intention of the Legislature in passing the act; although I submit that where the terms of an act are clear and unambiguous, as in the language of the enacting clause, these terms cannot be controlled by any supposed intention which may be presumed to have influenced the Legislature, or by considerations of the injustice of the result of the express terms used in the enacting clause.

778] *In the *Sussex Peerage Case* ⁽²⁾ the Committee for Privileges of this House desired the opinion of the Judges, which was given, and which was unanimous. The opinion was delivered by Lord Chief Justice Tindal. In the course of it the Lord Chief Justice said: "The only rule for the construction of acts of Parliament is that they should be construed according to the intent of the Parliament which passed the act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver." The opinion delivered by the Lord Chief Justice was approved of by the Lord Chancellor (Lyndhurst), and by Lords

⁽¹⁾ 1 Q. B. D., at p. 553.

⁽²⁾ 11 Cl. & F., 143.

Brougham, Cottenham, Denman and Campbell. And in the Scotch appeal, *Fordyce v. Bridges*, in this House⁽¹⁾, with reference to the construction of the Apportionment Act, the provisions of which, it was argued, were quite inapplicable to the law in Scotland, Lord Brougham stated: "We must construe this statute by what appears to have been the intention of the Legislature. But we must ascertain that intention from the words of the statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute."

I think, in accordance with these authorities, that in such a case as the present, where the words are clear and distinct, we must judge of the intention of the Legislature from the words of the act itself. But if it was relevant or competent to speculate as to what truly may have been the intention of the Legislature in passing the 74th section apart from the words of the statute, it appears to me, with great deference, that the intention of the Legislature may have been, amongst others, to give that amount of protection to the owners of piers which the words of the 74th section clearly imply, and so relieve them from the often difficult questions of evidence as to whether the damage was caused by the fault or negligence of the owners of vessels or their servants, in which cases (I mean if the damage was caused by the negligence of owners of vessels or their servants) there could be no doubt of their liability apart from the words of the statute.

It seems to me to be not unimportant, in considering the *question of intention, to consider the course of [779 legislation with reference to acts for the construction of piers and harbors prior to the passing of the consolidating act, with which your Lordships are now dealing. That act was passed, as the preamble bears, because it was "expedient to comprise in one act sundry provisions usually contained in acts of Parliament authorizing the construction or improving of harbors, docks and piers, and that as well for avoiding the necessity of repeating such provisions in each of the several acts relating to such undertakings, as for insuring greater uniformity in the provisions themselves."

In accordance with a suggestion made in the course of the discussion, I have looked into the private acts which were passed for the construction of piers and harbors during the session 9 & 10 Vict. (1846), the session immediately preceding that in which the consolidating act was passed, and I find that there were twelve acts passed in that ses-

(1) 1 H. L. C., 1.

sion, each of which contained a clause imposing liability for injury done to harbor works in the same general terms as those of the 74th clause of the consolidating act; and I presume, from the apparently stereotyped terms of the clauses in these acts, that the acts passed in previous sessions had contained clauses to the like effect. I observe that the Wear Commissioners in that session obtained a special act (c. 13), and it contains the clause to which I have referred, making an exception when a pilot was on board. The provision imposing liability for damage to pier and harbor works must, therefore, I think, have been familiar to the Legislature; and that circumstance appears to me to strengthen the presumption that the Legislature did intend, by the clause which your Lordships are considering, to impose the liability in the general terms it has done. And as the act affected so great interests as the piers and harbors of the United Kingdom, it is to be presumed that its terms would be thoroughly canvassed and carefully considered in its passage through Parliament, specially with the view of preventing any limitation, in the case of future piers and harbors, of rights which had been conferred on owners of piers by previous legislation.

The risk of causing damage to piers or harbors is, I apprehend, a risk which it would be competent to owners of [780] vessels to *insure against, although it might require an alteration of the existing form of policy by making an express provision against the risk of such damage. The supposed injustice of the 74th section thus resolves itself into a mere question of payment of money to cover the premium to secure against the risk of such damage.

My Lords, applying the authorities to which I have referred to the present case, I am humbly of the opinion, which I entertain with very great hesitation after the opinions which have been expressed by your Lordships, that the statute ought not to be construed as if it contained an exemption from liability for damage where it occurred from the act of God. The words of the statute appear to me to be express and unambiguous, and being so, I think they should be read according to their ordinary construction. But in accordance with the opinion expressed by your Lordships, the judgment will fail to be affirmed.

*Judgment appealed from affirmed; and
appeal dismissed with costs.*

Lords' Journals, 27th July, 1877.

Solicitor for the appellants: *J. W. Hicken.*

Solicitors for the respondent: *Johnson & Weatherall.*

See 17 Eng. Rep., 200 note.

If an act be done without fault on the part of the actor, and an injury result therefrom, arising from inevitable accident or from an act that ordinary human care and foresight are unable to guard against, it is the misfortune of the sufferer and lays no foundation for legal responsibility: *Harvey v. Dunlap*, *Lalor's Sup. to Hill & Den.*, 193; *Wakeman v. Robinson*, 1 Bing., 213; *Bullock v. Babcock*, 3 Wend., 391.

If, in the justifiable defence of himself against apparent danger of death or serious bodily injury, a party unintentionally or accidentally injure a bystander, the exigency excuses the act, and he is guilty of no criminal offence: *Plummer v. State*, 4 Tex. App. Rep., 310.

To constitute an actionable assault and battery, the result must have been unwarranted, but it need not have been committed in anger; and one may be liable for an injury to another resulting from his interference in a "scuffle" between two other persons, though done in good nature and from good motives: *Johnson v. McConnell*, 15 Hun, 293; *Peterson v. Haffner*, 59 Ind., 130.

Where one shot at a fox and accidentally hit and killed a dog, it was held that as the shooting was voluntary he was answerable for the consequences: *Wright v. Clark*, 50 Verm., 130, 135; *Underwood v. Hewson*, 1 Strange, 596; *Vincent v. Stinehour*, 7 Verm., 62.

So where a person, unprovoked, threw a piece of mortar at another, and a part of it struck a third person and injured his eye, without his contributory fault, though there was no intention to inflict the injury, and the act was done in sport, yet it having been done intentionally, the perpetrator, though an infant, was held liable for the injury inflicted, in an action against him, by the person injured, for damages occasioned by the assault and battery: *Peterson v. Haffner*, 59 Ind., 130.

See also *Clark v. Chambers*, 3 Q. B. Div., 327, cited with other cases, 17 Alb. L. J., 458; *Adams v. Waggoner*, 33 Ind., 531.

So if a boy fire powder crackers, in consequence of which a team runs away: *Conklin v. Thompson*, 29 Barb., 218.

Sickness is such an accident or act of God as will excuse performance of a contract for personal services: *Spalding v. Rosa*, 71 N. Y., 40; *Wolf v. Howes*, 24 Barb., 174, 666, 20 N. Y., 197; *Fahy v. North*, 19 Barb., 341; *Clark v. Gilbert*, 32 Barb., 577, 26 N. Y., 279; *Harrington v. Fall River*, etc., 119 Mass., 82; *Jennings v. Lyons*, 39 Wisc., 554, 557; *Robinson v. Davison*, L. R., 6 Exch., 269.

It has been held that the rule is otherwise where the sickness is one which should have been foreseen and provided against by the party in default. Plaintiff contracted to render to defendant the domestic services of himself and wife for one year, at a specified price. Four months and ten days thereafter the wife left the service in anticipation of her confinement; both were then discharged from the service, and the wife was confined four or six weeks thereafter. Held, that the plaintiff was not excused by such sickness, which he should have foreseen, and could not recover on a *quantum meruit*. *Jennings v. Lyons*, 39 Wisc., 553.

We doubt the soundness of this case, so far as it holds that the laborer could not recover for services of himself and wife down to the time of her illness, if she did not leave until reasonably compelled to do so in consequence of her condition, provided it had been shown affirmatively that at the time of the hiring the husband was not cognizant of the wife's condition. If he were, as the court presumed (p. 557-8), then the decision was clearly right, as the husband voluntarily made a contract to perform certain labor which he knew, or was bound to know, from the condition of the wife, he would be unable to perform.

Where the plaintiff apprenticed his son to a watchmaker and jeweler for six years, paying him a premium of twenty-five pounds, and the master duly instructed the apprentice for a year and then died, it was held, in an action against the master's representative for money had and received, to recover the whole or some part of the premium, on the ground of failure of consideration, that such failure being only partial the action was not maintainable. *Whincup v. Hughes*, L. R., 6 C. Pl., 78.

The foundering of a ship on which a

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sailor agrees to make a voyage, is such an unavoidable accident as excuses performance: *Daniels v. Atlantic*, etc., 24 N. Y., 447.

Where goods are to be transported by water, and, owing to the stage of the river, cannot be taken by water to their destination, the carrier is not bound to forward them overland; and, if there has been no want of diligence, is not answerable for delay, if the goods finally arrive safely: *Silver v. Hale*, 2 Mo. App. R., 557; *Parsons v. Hardy*, 14 Wend., 215; *Hand v. Baines*, 4 Wheat., 204.

Evidence that no boats arrived at the point of destination of the goods during the season is competent, as tending to show that the default was not occasioned by the negligence of the carrier: *Silver v. Hale*, 2 Mo. App. Rep., 557.

Inevitable accident, in cases of collision, is only when the disaster happens from natural causes, without negligence or fault on either side, and both parties have endeavored by every means in their power, with due care and caution, and with a proper display of nautical skill, to prevent the occurrence of the accident. It is not inevitable accident where a steam vessel is running through a dense fog at three knots an hour, after her officers have seen, before the fog settled, a fleet of schooners ahead, and have heard fog horns, and she collides with a schooner lying becalmed and sounding her fog horn at short intervals.

Inevitable accident cannot be deemed the cause of a collision where two schooners appear at the same moment, through a fog, lying becalmed, the one on the port and the other on the starboard bow of a steam vessel under steerage-way, and there is room for the steamer to be carried between them with a proper display of nautical skill: *Sampson v. U. S.*, 12 Court Claims Rep., 480.

See also 2 Eng. Rep., 156 note; *Silliman v. Lewis*, 49 N. Y., 379; *Hoffman v. Union Ferry Co.*, 68 N. Y., 385, 394, distinguishing *Walker v. Transportation Co.*, 3 Wall., 150; *Horne v. Dorr*, 10 Mass., 26, and *Noble v. Durell*, 3 Term Rep., 371.

Where the lessor agreed to make certain repairs or improvements before the commencement of the term,

the lessee may refuse to accept possession of the demised premises; and the fact that the lessor was prevented from making such repairs or improvements by circumstances over which he had no control, even by the act of God, is no excuse for his failure. The making of such improvements is a condition precedent to the lessee being compelled to take the premises, and he is not obliged to take the premises without them: *Hickman v. Rayl*, 55 Ind., 551.

The obligation of the vendor of an indeterminate thing who has undertaken to deliver it at a future time and at a certain place, e.g., "to deliver a certain quantity of glass, to be imported from Germany, the then next spring, in the port of Montreal," is not extinguished by the loss of the thing *in transitu*, even by *vis major*: *Thompson v. Beling*, 1 Quebec Law Rep., 67.

A railroad company is liable for damages resulting from a delay in the transportation of goods caused by a strike of its employes: *Pittsburg*, etc., v. *Hazen*, 84 Ills., 86.

But not if it promptly replace the "strikers" by other men, who are prevented by the "strikers" from doing duty by lawless and irresistible violence: *Pittsburgh*, etc., v. *Hazen*, 84 Ills., 86.

Where a party agrees to do certain work in a particular manner, there can be no recovery for doing such work unless there be a substantial performance: *Flood v. Mitchell*, 68 N. Y., 507, reversing 4 Hun, 813.

See 17 Eng. R., 204 note.

And upon the question of substantial performance, evidence that it was worth \$500 to complete it according to the contract is proper: *Flood v. Mitchell*, 68 N. Y., 507, reversing 4 Hun, 813.

Taking possession of one's own land on which the work has been done is not a waiver of the right to insist upon performance: *Flood v. Mitchell*, 68 N. Y., 507, reversing 4 Hun, 813.

A contract was entered into between K. and N. for the building of a house by N. for a certain sum. Whilst it was in course of erection it was blown down. K. then promised N. that if he would rebuild the house and complete it he should be paid \$300 additional. Held that the last contract was without consideration and N. could

not recover the \$300: *Mayor v. Kirby*, 2 Legal Chron. Rep., 831.

See 17 Eng. Rep., 204 note; 10 Eng. Rep., 117 note.

Where a tenant had the privilege of paying his rent in money or a good levee to be built during his term, and much work was done by him upon the levee, but it was never completed, having been washed away before it was finished; it was held the tenant was not entitled to credit for the work done: *Clayton v. McKinney*, 10 Heisk. (Tenn.), 72.

The rule that unless a contract for the erection of a building provides against contingencies that may happen during the progress of the work, the loss, if any occurs, will fall upon him who has agreed to do any given work that is possible to be done, because his agreement is to that effect, and he is not excused from performance by reason of its sudden destruction, can have no just application to a sub-contractor who has simply undertaken to do a distinct portion of the work: *Clark v. Busse*, 83 Ills., 515; *Schwartz v. Saunders*, 46 Ills., 18.

Where A. undertook to build a house for B. on his land, B. to furnish the materials, the dimensions were undetermined, the plan was under his control, and nothing was specified with respect to payment, but the rate of compensation according to admeasurement and the mode, that is to say, cash notes, and the house was burned before completion, held A. was entitled to recover for his labor, the court saying, "It is not like a case where a contractor is to furnish materials and do the work, and control the whole operation, and when finished and delivered to be paid for:" *Wilson v. Knott*, 3 Humphrey (Tenn.), 474.

See 17 Eng. Rep., 203-4 note.

As to the rights of parties under a contract by A., the owner of lots, that if B. will erect houses thereon he will convey the houses and lots for a certain price for each and take mortgages thereon for the purchase price, where there has not been a technical performance or tender thereof by either, and when B. will lose all rights, under such a contract, by laches, see *Matter of New Reservoir*, 1 Buffalo Superior Ct. R., 414.

Where land is taken for a public purpose under the right of eminent domain, the lien of a judgment creditor is cut off by the proceedings though he have no notice thereof. Land so condemned is taken by a municipal corporation discharged from the lien of a previous judgment but not from a mortgage lien: *Gimbel v. Stolle*, 59 Ind., 446; *Watson v. N. Y. Cent. R. R.*, 47 N. Y., 157.

The mortgagee has a right to be paid out of moneys awarded in such proceedings to the mortgagor, and his mortgage remains a valid lien if not notified thereof: *Astor v. Hoyt*, 5 Wend., 603; *Matter of John Street*, 19 Wend., 659; *Gimbel v. Stolle*, 59 Ind., 453; *Wilson v. European*, etc., 67 Maine, 358.

See 17 Eng. R., 203 note.

And a judgment creditor has an equitable right to be so paid: *Astor v. Miller*, 2 Paige, 68; *Brown v. Stewart*, 1 Md. Chy., 87; *Gimbel v. Stolle*, 59 Ind., 453.

Though a tenant is an "owner" within a statute giving compensation to owners: *Matter of New Reservoir*, 1 Buffalo Superior Ct. R., 408; *Gimbel v. Stolle*, 59 Ind., 450; *Parks v. Boston*, 15 Pick., 198; *Turnpike v. Broel*, 23 Penn. St. R., 29; *Brown v. Powell*, 25 Penn. St., 229; *Baltimore*, etc., v. *Thompson*, 10 Md., 76; *Enfield v. Hartford*, 17 Conn., 454.

See 17 Eng. Rep., 203 note.

But a mere squatter upon public lands, without right, is not: *Rosa v. Missouri*, etc., 18 Kans., 124.

Where the statute gave a penalty against the "owner" of a vehicle which should not seasonably turn to the right, in favor of any person who was injured from a failure to do so, held that by the word "owner" was intended the person in control of the vehicle, either mediately or immediately and not necessarily the actual owner, and that the proprietor of a livery stable was not liable for the failure of one to whom he had hired a team to seasonably turn out: *Camp v. Rogers*, 44 Conn., 291.

As to whether rent abates where land is taken under the right of eminent domain, see *Matter of New Reservoir*, 1 Buffalo Superior Ct. R., 414.

[2 Appeal Cases, 781.]

H.L. (E.), July 5, 27, 1877.

[HOUSE OF LORDS.]

781] *JOSEPH FLETCHER, JOHN MUSGRAVE, and CHARLES FISHER, Appellants; and SAMUEL WAGSTAFF SMITH, Respondent (').

Mine—Damage—Water—Construction of New Channel—Overflow from Storms.

A mine owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes, in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine, without default or negligence.

But where for his own convenience he does something, e.g., divert the course of a stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow, so that, even if that overflow should be directly and mainly occasioned by an act of nature, his own conduct in not so forming the new and diverted course for the stream, of form and of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter for consideration in determining the question of his liability.

Circumstances which will create liability in such a case.

THIS was an appeal against a decision of the Exchequer Chamber, which had affirmed a previous decision of the Court of Exchequer.

Smith was the plaintiff in an action of trespass. The declaration contained four counts. The first was for trespass generally, the second alleged that the plaintiff was possessed of a close called Crossgill, and of the mines under the same, and that the defendants were possessed of an adjoining close called Goose Green, and of the mines under the same, being in communication with, but on a higher level than, the plaintiff's mines, and alleged that the defendants wrongfully made holes in the surface of their land, and thereby wrongfully introduced quantities of water into the plaintiff's mines. The third count charged that the defendants permitted certain holes in the surface of their lands to remain open after such holes had ceased to be required for the proper working of the defendants' mines, whereby the mines of the plaintiff were flooded. The fourth count stated that the defendants had negligently diverted a watercourse flowing through their land without making a proper and sufficient channel to prevent it from flooding 782] *the adjacent land, by reason whereof it had flowed into the defendants' mines and so into the plaintiff's mines, and had flooded them. The defendants pleaded several

(') S. C., 8 Eng. Rep., 422; 8 Eng. Rep., 510.

pleas, and also demurred to the second, third and fourth counts. Replication and joinder in demurrer.

The cause was tried in 1872 before Mr. Justice Lush, when it was proved that the defendants' mine was on the higher, the plaintiff's on the lower level, that the defendants had diverted the course of a stream, and had made a new course for it, that in their workings of their own mine they had occasioned certain portions of the surface to sink into holes, though in doing this they had not acted negligently, that on the happening of a very heavy downfall of rain the water had overflowed its new course, got into the holes on the surface, and passed into the defendants' mine, and thence flooded the plaintiff's mine. It was contended for the defendants that they were thus shown not to be in fault, and that they were entitled to the verdict, or that a nonsuit ought to be entered. The learned judge, however, ruled that as the defendants had by their own acts occasioned the water to collect in the surface holes, and to overflow, they were absolutely liable for the consequences, and he rejected the evidence proposed to be given that the defendants had used all reasonable precautions against an ordinary overflow of water, and that this mischief was entirely to be attributed to a rainfall of exceptional severity (*). The plaintiff accordingly obtained a verdict, against which a rule was obtained for a nonsuit or a new trial, but which was sustained, after argument, in the Court of Exchequer (*). The case was then taken to the Exchequer Chamber, where the court so far sustained the decision as to refuse a nonsuit, but so far reversed it as to direct that a new trial should be had (*).

The second trial took place before Mr. Baron Pollock at the Cumberland Summer Assizes in 1874, when evidence of the very excessive rainfall was given, and the learned judge left five questions to the jury: "1. Was the mine flooded from natural causes *or from anything done by the [783 defendants.—Answer. From the act of the defendants. 2a. Was the flooding occasioned in the whole or in part by the diversion of the stream.—Answer. In part, and, chiefly, by the diversion of the stream. 2b. Or by the deficient condition of the new channel and the banks thereof.—Answer. And by the condition of the new channel. 2c. Was the stream in its diverted course more likely to overflow in

(*) It was said that the rainfall amounted to three inches in thirty-four hours, the general average at that place being forty-five inches in a year.

(*) *Nom. Smith v. Fletcher*, Law Rep., 7 Ex., 305; 8 Eng. Rep., 422.

(*) Law Rep., 9 Ex., 64; 8 Eng. Rep., 510.

time of flood, and would its overflow do more damage to the plaintiff than if it had been allowed to flow in its former channel.—Answer. The stream in its diverted course would be more likely to overflow, and so do more damage to the plaintiff. 3. Was the flooding occasioned by the failure of the diverted channel, or other means, to intercept the surface water on the broken ground.—Answer. Yes. 4. Was the flooding occasioned, not by the insufficiency of the channel, but by the result of the exceptional rainfall.—Answer. The rainfall was exceptional, but the new channel was insufficient. 5. Was what was done by the defendants done in the ordinary, reasonable, and proper working of their mine.—Answer. Yes, if the diversion of the stream had been properly executed.”

The verdict was entered for the plaintiff. Leave was reserved to enter a verdict for the defendants, but a rule for that purpose was, on the 22d of November, 1875, discharged; and, on appeal, that decision was, on the 21st of February, 1876, affirmed. This appeal was then brought.

The Attorney-General (Sir J. Holker, Q.C.), and Mr. Baylis, Q.C. (Mr. Vincent was with them), for the appellants, the defendants below: The findings of the jury were substantially in favor of the defendants, and the verdict ought to be entered for them. Where every reasonable precaution had been taken to prevent mischief from an overflow of water, the fact that it did overflow in consequence of an unprecedented storm of rain was not to be imputed as a fault to the defendants, but was an act of nature, for the consequences of which they were not responsible. The case of *Rylands v. Fletcher* (¹) was not [784] adverse to the defendants. On the contrary, it laid down a principle which the evidence at the second trial of this case showed to be applicable in their favor. They had used their land in the ordinary manner of its use, and if mischief happened thereby they could not be held liable. They had not brought themselves within the application of the other rule in the case, for they had not brought upon their land anything in itself mischievous, and then left it without taking proper precautions against the mischief. They had not brought the water on the land, it was there before, they had merely diverted its course, and, in doing so, they had taken every reasonable precaution to prevent mischief, for the evidence showed that the new course of the stream was much more capacious than the old, and therefore, according to all ordinary calculation, would carry off

(¹) Law Rep., 3 H. L., 330.

the water more quickly. One witness, indeed, expressly stated that "the diversion was quite sufficient to take all the water in ordinary times." The defendants were not responsible for extraordinary times, and the occasion in question was shown to be one of the most extraordinary.

Wilson v. Waddell (*), a very recent decision of this House, was entirely in favor of the defendants. It was there held that the right to work mines was a right of property, which, being properly exercised, begot no responsibility; and, therefore, when the ordinary working of a mine caused a subsidence of the surface land, a consequent flow of rain water into a lower coal-field gave no right of action. Here what had been done, had been so done in the exercise of the ordinary rights of a mine owner; it had been done in a careful and proper manner, and the means provided for the flow of the water were "more capacious than before." There was, consequently, no reason either in fact or law for holding these defendants liable. The principle which all these later cases had developed was stated years ago in *Smith v. Kenrick* (*), namely, that where there were owners of two adjoining mines, neither being subject to a servitude to the other, each had a right to work his own mine in a manner most convenient and beneficial to himself, although the natural consequence might be that some prejudice would accrue to the owner of the adjoining mine, so long as that did not arise from any negligence or misconduct. [785 That case was cited and commented on and adopted in *Rylands v. Fletcher* (*). *Baird v. Williamson* (*) was also cited there, and adopted, and that case declared that the owner of the upper of two adjoining mines was not liable for injury by water flowing, by gravitation, into the lower mine from works conducted by him in the usual and proper manner. There was no duty on a mine owner, or other person, to take precautions against the possible operations of nature, nor against the acts of other people. So that, even under the words of a statute (8 Vict. c. 20, s. 68) made for the protection of railway passengers, it was held that no duty was imposed on a railway company to keep up fences along the line so as to prevent cattle straying on the line, and so occasioning danger: *Buxton v. The North Eastern Railway Company* (*). The case of *Williams v. Groucott* (*) was not an authority against the de-

(*) 2 App. Cas., 95.

(*) 7 C. B., 515; 18 L. J. (C. P.), 172.

(*) Law Rep., 3 H. L., 330, 335, 339.

(*) 15 C. B., 376; 33 L. J. (C.P.), 101.

(*) Law Rep., 3 Q. B., 549.

(*) 4 B. & S., 149.

defendants, for the question there depended entirely on the relative rights of the owner of land and of a person who had a special right to sink a shaft on that land in order to work the mine below. That case was, therefore, entirely inapplicable here. But *Nichols v. Marsland* ⁽¹⁾ was clearly in favor of the defendants, for there it was held that one who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable for damage effected by an escape of the water if that is caused by the act of God, or *vis major*, as by an extraordinary rainfall which could not have been anticipated. And that was held although, if it could have been anticipated, the effect might have been prevented. And the principle was in reality admitted in *Crompton v. Lea* ⁽²⁾, where a bill to prevent certain works in a mine was held sustainable only because there was a distinct allegation that the works could not be executed without occasioning the damage sought to be prevented. Nothing of that sort could be said here. The watercourses were well executed, they were larger and more capacious than the old ones, and nothing but this extraordinary rainfall, which no one could have foreseen, and against which no one could have provided, had occasioned the mischief.

786] *Mr. *Crompton*, for the respondent: There was nothing in the cases cited to prevent the plaintiff from recovering, and the evidence and the findings of fact showed that the mischief had really arisen from the act of the defendants in not having in their new watercourse sufficiently guarded against the mischief of an overflow.

LORD PENZANCE: My Lords, the plaintiff's claim in this case was for damages in respect of the injury caused to his mine by the flood water which he alleges that the defendants wrongfully caused to flow into it. The water in question flowed down into the defendants' own mine through certain fissures or cracks in the surface of the soil above (and particularly through a hole known as Paddy Murray's Cut), which had been caused by the defendants having removed the soil below in the course of his mining operations, and from the defendants' mine it flowed into the plaintiff's.

Your Lordships cannot be asked, after the decision of this House in the recent case of *Wilson and another v. Waddell* ⁽³⁾, to hold that the defendants are liable as for a wrongful act for thus cracking and laying open the soil

⁽¹⁾ 2 Ex. D., 1.

⁽²⁾ Law Rep., 19 Eq., 115.

⁽³⁾ 2 App. Cas., 95.

above their own mine, so as to let through the rain water which might fall thereon.

Nor, indeed, although such a claim was originally made in the declaration, was it persevered in at your Lordships' bar, but the plaintiff's ground of complaint was narrowed to this, that the defendants had diverted a natural watercourse which ran across and over his mine, and that the diverted watercourse had been so inefficiently constructed, that, on the occasion of certain heavy falls of rain, the water flowed over the top of the artificial bank of the watercourse, carried away a part of that bank, and, thus released, poured down in large quantities through the fissures and holes in the surface, and flooded the plaintiff's mine.

The answer of the defendants to this complaint was, as presented to your Lordships in argument, that the new and diverted watercourse was as efficient for carrying off the water as the old one had been; but that the rainfall and consequent flooding were *of so unusual and excep- [787 tional a character, that neither the new, nor the old watercourse if that had been in existence, could possibly carry off the water.

The case has been before two juries; it seems to have been withdrawn from the first, but on the second occasion the learned judge left several questions to the jury for their decision, the answers to which are now before your Lordships, and the contention of the defendants is, that upon those answers, and upon such inferences of fact as your Lordships may draw from the evidence, not inconsistent with these findings, the defendants are entitled to have the verdict entered for them.

At the threshold of the inquiry, as to the defendant's liability to the plaintiff, lies the question—what obligations did the defendants incur when they diverted the natural watercourse? It is not on the one hand a question in this case, whether the defendants were required thus to divert the watercourse before they pursued their mining operations in its neighborhood; and, on the other hand, it is not made a ground of complaint against them that they did divert it. But, in diverting it, what were their obligations?

Was it enough to make the new and artificial watercourse as efficient, but no more so, than the old and natural one, so that whatever defects, incapacity, or otherwise, the old one had, might, without responsibility, be reproduced in the new one?

Or, secondly, were they bound (as they, for their own convenience, were making a new and artificial watercourse),

to construct it in such a manner that it would be capable of conveying off the water that might flow into it from all such floods and rainfalls as might reasonably be anticipated to happen in that locality?

Or, thirdly, were they bound to make provisions for any such quantities of water as might possibly be discharged into it from any mere rainfall, however heavy, however unusual, and however contrary to all previous experience?

The choice between these three propositions is a question of interest capable of being very variously regarded, and before a decision is come to upon it, the matter should be very carefully considered.

788] *For my own part, I incline to think that the second proposition defines the true measure of the defendants' obligations, but I desire to express no positive opinion to that effect.

For I submit to your Lordships that you are not called upon to give your adhesion to any one of these propositions on the present occasion, inasmuch as whichever of the above three propositions may properly define the defendants' obligations, it is plain, from the undisputed facts of the case, that they did not fulfil the last of them, and it is, I think, equally plain that the jurors have found that they did not fulfil either of the other two.

I will shortly point out that this is so.

The jurors first say generally that the flooding was caused "by the act of the defendants" as distinguished from "natural causes." In their next answer they say the flooding was caused chiefly by "diverting the stream" and "by the condition of the new channel." In other words, they affirm that it was by directing the stream into a channel, the condition of which was not sufficient, that the major part of the mischief was done.

These answers, if they stood alone, would leave it open to be contended that the "condition" which they considered insufficient was a condition which, although sufficient to meet the requirements of any rainfall which might reasonably be expected, was yet insufficient to encounter the pressure of an exceptional rainfall such as could not be reasonably anticipated.

But this view of the meaning of the jury is no longer possible, when their answer to question four is considered. The question was pointedly put to them, "Was the flooding occasioned *not by the insufficiency of the channel, but by the result of exceptional rainfall*?" and the answer is, "The rainfall was exceptional, but the new channel was

insufficient." To which they add, in their fifth and last answer, "What was done by the defendants would have been done in the ordinary, reasonable, and proper working of the mine, if the diversion of the stream had been *properly executed*."

These answers make it clear, I think, that the insufficient condition of the new channel to which the jurymen were referring was an insufficiency to cope with a rainfall *not exceptional*, or, in other words, a rainfall such as might by a reasonable man be anticipated.

*The remaining point, which was chiefly, if not [789 wholly, relied upon in argument before the House, was this, that the new watercourse was as capable of carrying off the waters, on the occasions in question, as the old one would have been. This question, it was argued, had never been presented to the jury, whereas the evidence upon it was largely, if not wholly, in favor of the defendants.

As regards the weight of evidence, I consider that it is not open to this House upon this appeal (which is against the discharge of a rule obtained by the defendants to enter the verdict for them upon the findings of the jury), to entertain the question whether the verdict was against the weight of evidence.

And, as regards the contention that the comparative capacities of the two watercourses were never submitted to, or adjudicated upon, by the jury, I conceive that it is wholly untenable in the face of the following question put by the judge, and answer given by the jury: "Was the stream in its diverted course more likely to overflow in time of flood, and would it overflow and do more damage to the plaintiff than if it had been allowed to flow in its former channel?" Answer: "The stream in its diverted course would be more likely to overflow and so do more damage to the plaintiff."

Nor can it be said that the attention of the jury was not called to the full meaning and understanding of this question? For in summing up the learned judge said, "Therefore I ask this question, whether the flooding was occasioned by the diversion of the stream, or by the deficient condition of the new channel, or the banks thereof? To make that clear I may also ask you, was the depth of the channel such as to make it as capacious and efficient as the former channels?"

It is clear therefore, I think, that the jury considered the new channel not as efficient as the old one would have been. And although it seems to have been proved as a matter of measurement that the cubical capacity of the new channel

surpassed that of the old, it must be borne in mind that the bends and curves in the new channel, which did not exist in the old one, may have had the twofold effect of impeding the rapid discharge of a great body of water, and of creating 790] by a great accumulation of water an *unusual strain upon the banks, at the points where these bends occurred, causing the overflow of the water and the gradual destruction of the banks themselves. The jurors, several of whom appear to have viewed the spot, may well therefore have been justified in coming to a conclusion against the sufficiency of the new watercourse as compared with the old, notwithstanding the evidence as to its cubical capacity upon which the defendants' counsel so strongly relied.

For these reasons I submit to your Lordships that the decision of the Court of Appeal, affirming the decision of the Exchequer Division, should be affirmed by this House, and the appeal against it be dismissed with costs.

THE LORD CHANCELLOR (Lord Cairns): My Lords, I do not think it necessary in this case to say more than that I have attentively listened to the opinion so clearly expressed by my noble and learned friend; I have indeed had previously an opportunity of considering, upon paper, that opinion, and it so fully expresses the views which I entertain as to this case, that I shall not say more than that I entirely concur in the motion which he has proposed to your Lordships.

LORD HATHERLEY: My Lords, I too have had the advantage of perusing the opinion which has just been delivered, and concurring, as I do entirely, in the view which he has there expressed, I am content to say that I agree in the decision proposed to be pronounced.

LORD BLACKBURN: My Lords, I also entirely concur in the opinion.

LORD GORDON: My Lords, I also concur, and I think it unnecessary to add many observations.

My Lords, the circumstances of this case are different from those of *Wilson v. Waddell*, decided by your Lordships on the 1st of December, 1876, on an appeal from the Court of Session in Scotland.

791] *The facts of this case have been brought out very clearly and distinctly in the opinion which has been expressed by my noble and learned friend opposite, Lord Penzance. The contention of the appellants at your Lordships' bar was that the new channel was sufficient for carrying off the water, had it not been for the result of an exceptional rainfall, against which, it was contended, that

there was no duty imposed upon them to provide. But, as has been pointed out by his Lordship, this matter was submitted to the jurors by the judge who presided at the trial; and they found that the damage was caused by the insufficiency of the new channel, and that the diversion of the stream had not been properly executed. I think the result expressed by his Lordship is fully supported by the findings of the jury, to which he has referred.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 27th July, 1877.

Solicitors for appellants: *Gregory, Rowcliffes & Co.*

Solicitor for respondent: *J. R. Musgrave.*

See 19 Eng. Rep., 6 note; Id., 840 note; 16 Eng. Rep., 386 note; 15 Eng. Rep., 253 note; 14 Eng. R., 543 note; 9 Eng. Rep., 556 note.

If, in changing the natural grade of a street, the city is negligent, and adjacent lots are injured thereby, the city is liable therefor.

While the city may raise the grade of a street, yet it has not the right in thus raising the grade to make a deposit of earth upon the lot of an adjacent owner: *Hendershott v. O'Humwa*, 46 Iowa, 658.

Where, by raising the grade of a street, the drainage which before existed is destroyed, the city is liable in an action by an adjacent property owner for failing to provide a temporary means for the escape of the surface water, where such provision was practicable. The construction of a culvert which is at once closed up will not relieve the city from liability. How long the city is bound to provide an escape for the water, or how long the owner of the property may leave his lots unfilled, at the peril of the city, is a question of fact to be determined by the city: *Ross v. Clinton*, 46 Iowa, 606.

If the waters of a stream are discharged, through an artificial culvert, under a highway, and the culvert is closed by the town authorities in repairing the highway, the owner of a mill on the stream cannot maintain an action of tort against the town for an injury occasioned to his property thereby, in the absence of evidence

that he had acquired any right in the culvert by prescription or contract, if the closing of the culvert was a proper and suitable means of repairing the highway: *Drew v. Westfield*, 124 Massachusetts, 1.

A railway company is not liable for damages in an action by a proprietor, over whose land it is lawfully located, for an injury to his premises caused by the roadbed preventing the accumulation of surface waters from passing where they were accustomed to flow: *Morrison v. Bucksport*, etc., 67 Maine, 353.

As to liability for obstructing the drainage of surface water, see *Vandenviele v. Taylor*, 65 N. Y., 341; *Damour v. City of Lyons*, 44 Iowa, 276.

Where a railroad is so constructed as to interfere with or block up a water channel, the company is responsible for all the direct consequences of throwing the water out of its natural course. Non-user of a water course for a time will not be treated as an abandonment of the right to use it: *Gordon v. Penn. Railway Co.*, 6 Weekly Notes (Penn.), 405.

As to damage to one mine owner from water from natural flow of water from upper mine: *Philadelphia*, etc., v. *Taylor*, 1 Leg. Chron. Rep., 361.

Though a railway company is, by statute, liable to a town for damages resulting from a failure to restore or protect a highway in its usefulness: *Morrison v. Bucksport*, etc., 67 Maine, 353; *Gear v. The C. C. & D. Railway Co.*, 43 Iowa, 83; *Little Miami*, etc., v.

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Commissioners, 31 Ohio St. R., 338; *People v. N. Y. Cent., etc.*, 7 N. Y. Weekly Dig., 296, N. Y. Court Appeals, modifying 12 Hun, 195.

The plaintiff was lessee of premises which were drained by a sewer made by the landlord in the street, with the assent of the corporation, who paid half the cost of constructing it. The corporation used it with the landlord's consent as part of the drainage system of the city, and connected it with two large drains of more than double its capacity. In consequence of the accidental bursting of a water pipe near it, a greater quantity of water was discharged into it than it could carry off, and the plaintiff's cellar was flooded and his goods damaged. Held that the defendant, the city, was guilty of negligence; and that the plaintiff's neglect to use sufficient exertion to save his

goods could, at most, only affect the quantum of damages: *Coglan v. City of Ottawa*, 1 U. C. Appeal Rep., 54.

See 19 Eng. R., 8 note.

As to how far the completion of a bridge across a river will be compelled by mandamus, see *York, etc., v. Regina*, 7 Eng. Railway and Canal Cases, 458, reversing *Id.*, 236.

As to compelling it to restore or refrain from destroying ponds used for watering cattle, see *Regina v. North, etc.*, 3 Eng. Railw. Cas., 764.

The servants of the occupants of an upper tenement negligently left open a faucet, thereby causing the water to overflow and flood the tenement below: Held that the occupants of the upper tenements were liable for the damage thereby done: *Simonton v. Loring*, 2 Pacific Coast L. J., 216, to appear in 68 Maine.

[2 Appeal Cases, 792.]

H.L. (I.), July 12, 18, 17, 27, 1877.

[HOUSE OF LORDS.]

792] *THOMAS DOOLAN, Appellant; and THE DIRECTORS, &c., OF THE MIDLAND RAILWAY CO., Respondents (¹).

Railway Acts—Traffic—Land and Sea Carriage—Illegality.

The Traffic on Railways and Canals Act, 1854 (17 & 18 Vict. c. 31), applied to the whole traffic upon railways, and not merely to their passenger traffic, but only applied to traffic on railways or canals.

The Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 31, extends the act of 1854 to steam vessels, and the traffic carried on thereby, which vessels railway companies own or work.

The Railways Regulation Act, 1871 (34 & 35 Vict. c. 119), s. 12, applies to cases where a railway company, under a contract to carry persons, animals, or goods by sea, procures the same to be carried in a vessel not belonging to the company nor worked by the company, and the company becomes liable for damage in like manner as if the vessel had belonged to the railway company.

The 7th section of the act of 1854 did not allow of the limitation of the liabilities of railway companies, except by such "conditions" as should be held by a court or judge to be just and reasonable, and be embodied in a special contract, which should be signed by the owner of the goods.

The word "servants" in the Railway and Canal Traffic Act, 1854, s. 7, means not merely servants, properly so called, but also the agents (not strictly servants), employed by railway companies to do for them work which they are under a contract with others to perform.

Muchu v. The London and South Western Railway Company (²) approved.

A railway company made contracts to carry animals from a port of Ireland to a town in England, on "through" tickets. The paper or ticket contained, in substance, the following condition: "that with respect to any animals, &c., booked through, by them or their agents, for conveyance partly by railway and partly by

(¹) Reversing Irish Law Reports, 10 C. L., 47.

(²) 2 Ex., 47.

sea, or partly by canal and partly by sea, such animals, &c., will only be so conveyed on the condition that the company shall be exempt from any liability for any loss or damages which may arise during the carriage of such animals, &c., by sea, from the act of God, &c., accidents from machinery, &c., and all and every other damages and accidents of the seas, rivers and navigation of whatever nature and kind soever, in the same manner as if the company had signed and delivered to *the consignor a bill of lading containing such condition. Nor will the [793 company be responsible for loss of, or damage to, animals, &c., arising from damages or accidents of the sea, or of steam navigation, the act of God, &c., jettison, barratry, collision, improper, careless, or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master or any of the officers or crews of the company's vessels:."

Held, that the words "master and crew of the company's vessels," in this condition applied to all such vessels as the company should employ, and not merely to vessels owned or worked by the company itself; and that the condition was unreasonable and void.

If a railway company is guilty of an illegality by working steamboats, not being authorized by law to work them, it cannot set up such illegality as an answer to a claim for damages arising out of the working of such steamboats.

THIS was an appeal against a decision of the Court of Exchequer Chamber in Ireland, which (*diss.* Lord Chief Justice Whiteside) had reversed a judgment of the Court of Common Pleas there (').

The plaintiff was a cattle dealer, who had sent sixty-three cattle to the defendants to convey to England. The cattle were taken on board the St. Columba steamer, which was employed by the defendants to make the voyage between Dublin and Liverpool, and, on arriving in England, the cattle were to be conveyed by the defendants' railway to St. Ives, in Huntingdonshire. The vessel was wrecked on the Skerries Rock, near Holyhead, and the cattle lost.

The contract note stated in the usual way the number of cattle to be conveyed, and one part of the writing thereon was in the following terms:—

"It is hereby agreed between the undersigned and the Midland Railway Company that the animals named on the other side are to be conveyed only upon the conditions mentioned upon the back of the invoice handed to the undersigned by the company's agent."

On the back portion of the contract note handed to the consignor were certain "Conditions of Carriage," the third of which began in this way: "Under clause 7 of the act intituled 'An Act for the Better Regulation of Traffic on Railways and Canals,' *17 & 18 Vict. 1854, it is pro- [794 vided;," and then came the enactment limiting the amount to be recovered, in case of injury to horses and cattle, to a certain sum unless a higher value had been previously declared and an increased rate paid. The condition went on, "In no case will the company be liable for injury caused

(') Ir. Rep., 10 C. L., 47.

by fear or restiveness of animals. Animals are carried only in conformity with this notice." The last of the "Conditions" was in the following terms:—

"That with respect to any animals, &c., booked through for conveyance partly by railway and partly by sea, such animals, &c., will only be so conveyed on the condition that the company shall be exempt from liability for any loss or damages which may arise during the carriage of such animals, &c., by sea, from the act of God, the Queen's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. Nor will the company be accountable or responsible for loss of, or any damage or injury to, animals, &c., intrusted to them, arising from the dangers or accidents of the sea, or of steam navigation, the act of God, the Queen's enemies, jettison, barratry, collision, improper, careless or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master, or any officers or crews of the company's vessels."

In addition to the ordinary issues of fact, the defendants pleaded (thirdly) that the cattle were delivered to them to be carried from Dublin to St. Ives under a through-booking arrangement, upon the terms that the defendants should not be accountable for injury to the cattle while shipping, during the sea passage, or landing; and that the injury to the cattle was occasioned during one of these periods. By the fourth plea the defendants alleged that the delivery of the cattle for carriage to St. Ives was upon the terms that the defendants would not be accountable for any loss or injury arising from improper, careless, or unskilful navigation, or any default or negligence of the master, officers, or crews of the company's vessels, and that the loss here was 795] a loss arising from *improper, careless, or unskilful navigation, or from some default of the master, officers, or crew of the vessel. In the sixth plea there was a similar allegation, averring, also, that the condition therein mentioned was a reasonable condition. The ninth plea stated that the defendants were not authorized to build, buy, hire, or use, maintain, or work, or to enter into arrangements for using, &c., steam vessels for the purpose of carrying on a communication between Dublin and Liverpool, and that the cattle were delivered to the defendants under a through-booking arrangement to be carried from Dublin to Liverpool by

sea, in the steamship *St. Columba*, being a vessel which did not belong to, and was not hired, used, maintained, or worked by the defendants, and to be carried from Liverpool to St. Ives on the defendants' railway, upon the conditions that the defendants would not be accountable for loss or injury from improper, careless, or unskilful navigation, and that the loss complained of arose from improper, careless, and unskilful navigation.

The plaintiff demurred to the different pleas which alleged the conditions on the ground that such conditions were neither just nor reasonable.

The defendants demurred to the replications on the ground that it was immaterial whether the conditions were reasonable or just, and that no new facts were shown to obviate or repel the legal effect of the defendants' averments⁽¹⁾.

The defences intended to be raised were in substance these: first, that the defendants were protected by the conditions, even though the conditions were unreasonable, and that the 17 & 18 Vict. c. 31, s. 7, and the 31 & 32 Vict. c. 119, s. 14, and the 34 & 35 Vict. c. 78, s. 12, acts regulating traffic on railways and canals⁽²⁾, did not apply to the case; secondly, that the conditions were reasonable.

*The cause was tried before Lord Chief Baron Palles, [796

⁽¹⁾ There had been a case arising out of the same circumstances, and where the same questions were raised, and in that case, *Moore v. The Midland Railway Company* (Ir. Rep. 8 C. L. 232; *Ibid.*, 9 C. L. 20), the decisions first on the demurrers, and next on the case itself, had been in favor of the plaintiff. There was no appeal in that case.

⁽²⁾ 17 & 18 Vict. c. 31, s. 7 (Railway and Canal Traffic Act, 1854): "Every such company as aforesaid shall be liable for the loss of, or for any injury done to, any horse, cattle, or other animals," &c., "occasioned by the neglect or default of such company, or its servants, notwithstanding any Notice, Condition, or Declaration, made and given by such company, contrary thereto, or in anywise limiting such liability: Every such Notice, Condition, or Declaration, being hereby declared to be null and void." Then came the provision that such conditions might be made as should be adjudged, by a court or judge "before whom any question relating thereto shall be tried, to be just and reasonable." Then followed

a proviso limiting the value of the animals, except upon payment to the company for the increased risk—the percentage or increased rate of charge to be notified in the manner prescribed by the 11 Geo. 4 & 1 Wm. 4, c. 68—the proof of the value to be upon the person claiming compensation: "Provided that no special contract between the companies and any other parties respecting the receiving, forwarding, and delivering" of any animals, or goods, &c., "shall be binding upon or affect any such party unless the same be signed by him," &c., or the person delivering such animals or goods. And this act was not to alter the rights of any company under the 11 Geo. 4 & 1 Will. 4, c. 68.

26 & 27 Vict. c. 92, s. 30 (Railways Clauses Act, 1863): "Where a railway company is authorized to build, buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working" steam vessels, the tolls taken were to be made so as to secure equality.

Sect. 31: "The provisions of the Railway and Canal Traffic Act, 1854, so

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at the Kildare Summer Assizes, 1874, when the jury found the loss was occasioned by negligence of the defendants' servants, and not *by the dangers of the seas. The Lord Chief Baron ruled that the contract was within the 17 & 18 Vict. c. 31, s. 7, and that the conditions were unreasonable. The verdict was therefore entered for the plaintiff for £765 damages. Leave was reserved to the defendants to move to enter the verdict for them if the court should think the defence sustainable. The defendants, in Michaelmas Term, 1874, obtained a conditional order for that purpose, and after argument the Court of Common Pleas ordered the verdict to be entered for the plaintiff, and upon the point of an application for a new trial discharged the rule. The case was then taken to the Court of Exchequer Chamber where (Lord Chief Justice Whiteside, *diss.*) the judgment of the Court of Common Pleas on the demurrers and on the motion for a new trial was reversed (¹), the conditional order was directed to be made absolute, the verdict for the plaintiff to be set aside, and the verdict to be entered for the defendants,

far as the same are applicable, shall extend to the steam vessels and to the traffic carried on thereby."

31 & 32 Vict. c. 119 (Regulation of Railways Act, 1868), s. 14: "Where a company by through-booking contracts to carry any animals, luggage, or goods, from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from any loss or damage which may arise during the carriage of such animals, luggage, or goods by sea from the act of God, the King's enemies, fire, accidents from machinery and boilers, and steam and all and every other dangers, and accidents of the seas, rivers, and navigation of whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through-booking is effected, and if printed in a legible manner on the receipt or freight-note which the company gives for such animals, luggage, or goods, be valid as part of the contract between the consignor of such animals, luggage, or goods, and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition."

Sect. 16: "Where a company is authorized to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or

working steam vessels for the purpose of carrying on a communication between any towns or ports, and to take toll," and there was to be equality of treatment in that respect of all passengers carried—and then followed this enactment: "The provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam-vessels and to the traffic carried on thereby."

34 & 35 Vict. c. 78, s. 12 (Regulation of Railways Act, 1840 to 1871): "Where a railway company, under a contract for carrying persons, animals, or goods, by sea, procures the same to be carried in a vessel not belonging to the railway company, the railway company shall be answerable in damages in respect of loss of life or personal injury, or in respect of loss of, or damage to, animals or goods, in like manner and to the same amount as the railway company would be answerable if the vessel had belonged to the railway company: Provided that such loss of life or personal injury, or loss or damage to animals or goods, happens to the person, animals, or goods (as the case may be), during the carriage of the same in such vessel; the proof to the contrary to lie on the railway company."

(¹) Ir. Rep., 10 C. L., 47-91.

and it was farther ordered "that each party do abide his own costs of the appeal to and proceedings in this court." This appeal was then brought.

Mr. *Macdonough*, Q.C. (of the Irish bar), and Mr. *Benjamin*, Q.C. (Mr. *J. D. Fitzgerald* was with them), for the appellant: It is admitted that the act of God, as it is called, and the act of the Queen's enemies, are excepted from those matters which render companies liable. But here neither of these causes of exemption exists. The question was distinctly left to the jury whether this loss was occasioned by the perils of the sea, or by the negligence of the defendants' servants; and the finding was *distinct and express [798 that it was occasioned by the negligence of the defendants' servants. To hold that on such a finding the defendants could be exempted from liability would be to hold out a premium to negligence, which the law could never intend. But then it is said, first, that the master and crew of the vessel were not the servants of the defendants, and consequently could not make the defendants liable for their acts; and next, that, whether they were the defendants' servants or not, the defendants were protected by the conditions which they had marked on the ticket issued by them. Neither of these answers is sufficient. The steam vessel was employed by the company, and, consequently, though not the railway company's own property, was within the words of the several acts which allow railway companies to hire, employ, and use steamboats, and make them liable for losses on steamboats thus hired, employed, and used. The persons navigating them are, for such a purpose, the servants of the railway company: *Machu v. The South Western Railway Company* (*). When a railway company agrees with a passenger, or with a consignor of goods, for a through conveyance, the company so agreeing remains liable for the whole transit, and the liability cannot be divided: *Cohen v. The South Eastern Railway Company* (*), where *Stewart v. The London and North Western Railway Company* (*) was expressly overruled. The only exception was, when part of the through journey was to be performed in a foreign country, the laws of which and the governmental habits of which were entirely different from our own, in which case the question might, of course, be raised by what law the contract was to be governed: *Cohen v. The South Eastern Railway Company* (*). If a railway company chose to make

(*) 2 Ex., 415.

(*) 1 Ex. D., 217; 2 Ex. D., 253.

(*) 3 H. & C., 135.

a conveyance by sea a part of its undertaking, it must accept the responsibilities which Railway Acts imposed upon it.

Now, what were those Railway Acts? The first was that which was passed in 1854, and was called the Railway and Canal Traffic Act, 1854, the 7th section of which made a railway company liable for injury "to horses, cattle, or other animals occasioned by the neglect or default of such 799] company or its servants," and any *notice or condition pretending to limit this liability was declared to be void. The proviso which followed admitted that special contracts might be entered into, but, to be binding, they must be declared by a court or a judge to be reasonable, and they were to be embodied in a writing, which was to be signed by the person delivering the animals. The 11 Geo. 4 & 1 Will. 4, c. 68, was referred to, but not any limitation of liability was adopted from that statute. The only matter that was adopted was the necessity of having a contract, if it was intended to limit it. Then came the 26 & 27 Vict. c. 92, which recognized a right in railway companies to "build, buy, or hire, and to use, maintain, and work" steam vessels, which did not, perhaps, apply to this case, "or enter into arrangements for using, maintaining, or working" them, which had been done here; and in all such cases the Railway and Canal traffic Act, 1854, was to "extend to the steam vessels and to the traffic carried on thereby." The 31 & 32 Vict. c. 119, s. 14, would be relied on by the other side; but that section, though allowing a condition to exempt the railway companies from liability on a "through-bookings contract" as to animals, &c., carried partly by sea, only gave the exemption (see the section, *ante*, p. 796) in respect of certain specified matters, no one of which included the negligence of the master and crew of the vessel. Here the express finding was that that negligence was the cause of the loss; and, therefore, whatever effect was given to this restrictive clause, it could not touch this case. Then came the 16th section, which in all such cases said that there should be an equality of tolls for all passengers, and went on to declare that the provisions of the act of 1854 should be applicable "to the steam vessels and to the traffic carried on thereby." It was said that this did not apply to the carriage of animals; but whatever might have been the doubts raised about the mere wording of previous acts, or of this particular section, it was removed by 34 & 35 Vict. c. 78, the 12th section of which (see *ante*, p. 797) exactly met this case. That 12th section provided that when railway companies, under a contract to carry persons, animals, or

goods by sea, procured them to be carried in a vessel not belonging to the company, it should be answerable for loss of life, or personal injury, or for damage to the animals or goods, as *it would have been answerable if the vessel had belonged to the company. There could be no doubt that this was meant to fix the liability on the railway company without permitting any question as to the legal power of the company to build, to hire, or to employ or use vessels: and taking these various acts together, it was clear that the general provisions of the act of 1854 were applicable, and that the various efforts of the companies to get rid of their liability had been met and provided against by the Legislature. [*Peek v. The North Staffordshire Railway Company* (*), and *Hodges on Railways* (*) were referred to.]

Mr. Walker, Q.C. (of the Irish bar), and Mr. Watkins Williams, Q.C., for the respondents: Treating this as a through contract, it does not follow that every part of it involves the same liability, and is subject to the same rules of construction. The contract is divisible: *Le Couteur v. The South Western Railway Company* (*). And that distinction was still farther enforced by *Zunz v. The South Eastern Railway Company* (*), which established that though a through contract might render a company liable so far as the journey went on its own line, it might not be applicable where the goods to be carried were delivered over to the charge of another company. And that was really only following out the previous decision in *Aldridge v. The Great Western Railway Company* (*), where a condition to that effect was held to exempt the company from liability.

Without entering into the question whether railway companies must be liable, at all events and under all circumstances, for losses occurring in steamers which were their own—which, considering the cases already cited, was very doubtful—there was good reason for saying that they could not be held liable for losses in steamers which did not belong to them, and which they were not by law authorized to build, or buy, or hire, or use, maintain, and work. So far as the conveyance by sea was concerned, the work was that of another and a distinct company, for the acts of which the defendants were not to be made responsible. The steamer *was the property of the Dublin Steam Packet Company, and was managed by the master, officers, and crew of that company, it was not under the control of the defendants,

(*) 10 H. L. C., 473.

(*) 6th ed., p. 593.

(*) Law Rep., 1 Q. B., 54.

(*) Law Rep., 4 Q. B., 539.

(*) 15 C. B. (N.S.), 582; 33 L. J. (C.P.),

161.

of their servants, and the defendants had expressly, by general notice, and by the condition indorsed on the ticket, expressly declared that it would not be liable for what was done on the steamer, a steamer, in fact, over which the company had no control. And this notice was not to be treated as a surprise upon the plaintiff, for he had often travelled in the same way before, and was well acquainted with the regulations of the company. He was, therefore, guarded with all the protections which the 31 & 32 Vict. c. 119, had intended to give to such persons, and was subject to the provisions of that statute, which enabled railway companies, by a notice of this kind, to exempt themselves from liability, and bound the person, acquainted with such a notice, in the same manner as if he had had a bill of lading containing the condition delivered to him. It was quite clear that in this respect the Legislature intended that the owner of goods sent by sea should be in fact subject to the operation of the laws relating to merchant shipping, and not merely to those applicable to railways alone. This was really established by the case of *The Normandy* (*), in which the South Western railway Company was the party concerned. And even the 34 & 35 Vict. c. 78, in sect. 12, so much relied on by the other side, strengthened this argument, for that section assimilated railway companies employing steamers to railway companies which had steamers of their own, and were, therefore, altogether in the condition of persons carrying by sea. Now, as to shipowners, their liabilities were clearly defined, and wherever a railway effected the transit of animals or goods by sea, the rules of law applicable to shipping could alone be applied. The fact of booking through did not affect the question of liability. That was done merely for convenience in business, and was for the advantage of the plaintiff, who would otherwise have had to make two or three payments instead of one, and would have found that these separate payments were not only more troublesome but more costly than the through-booking system. Such cases as *Peek v. The North Staffordshire Railway Company* (**) were not applicable to *the present. The circumstances were different, and the law relating to them was different. The right which the defendants possessed at common law to protect themselves by conditions in contracts into which they entered had not been taken away by statute, or if affected by the enactment that such conditions must be just and reasonable, it was confidently submitted that these conditions were, with reference to the sea passage,

(*) Law Rep., 3 Adm. & Ecc., 152.

(**) 10 H. L. C., 473.

and with relation to the facts of this case, entirely just and reasonable, and ought to have been allowed their full force.

[*Johnson v. The Great Southern and Western Railway Company* (1), *Zunz v. The South Eastern Railway Company* (2), *McCance v. The London and North Western Railway Company* (3), were also referred to.]

LORD BLACKBURN: My Lords, the defendants below represent a railway company incorporated by acts of Parliament in the ordinary way for making and carrying on a line of railway in England. In no one of its special acts has it got what may for convenience be called steamboat powers.

The company, at an office which it has in Dublin, made a contract with the plaintiff to carry sixty-three head of cattle for him from Dublin to St. Ives, in Huntingdonshire, for reward. To fulfil this contract it was necessary that the railway company should, in vessels belonging to it, carry, or should procure some shipowner in his vessels to carry, on its account, those cattle across the sea. It was immaterial to the plaintiff which, provided the cattle were carried across. The railway company did procure the City of Dublin Steam Packet Company to carry the cattle in a steam vessel called the *St. Columba*. There was no privity of contract between the plaintiff and the City of Dublin Steam Packet Company.

The jurors have found that the cattle were lost, not by any peril of the seas, but by the negligence of the crew of the *St. Columba*.

Had this been all, the railway company would plainly have been answerable to the plaintiff for the damage [803 sustained from not fulfilling the contract to carry the cattle to St. Ives, whether the liability was that of common carriers, or was not so extensive. But the contract was in writing and signed by the plaintiff, and contained, amongst others, the following condition: "Conditions of Carriage. The Midland Railway Company give public notice that they convey horses, oxen, sheep, calves, and pigs in wagons, and by cattle or merchandise trains, subject to the following conditions:- That with respect to any animals, luggage, parcels, goods, or other articles booked through by them or their agents for conveyance, partly by railway and partly by sea, or partly by canal and partly by sea, such animals, luggage, parcels, goods, or other articles, will only be so conveyed on the condition that the company shall be ex-

(1) Ir. Rep., 9 C. L., 108.

(2) 7 H. & N., 477.

(3) Law Rep., 4 Q. B., 539.

empt from liability for any loss or damages which may arise during the carriage of such animals, luggage, parcels, goods, or other articles, by sea, from the act of God, the Queen's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. Nor will the company be accountable or responsible for loss of, or any damage or injury to, animals, goods, or property intrusted to them, arising from the dangers or accidents of the sea, or of steam navigation, the act of God, the Queen's enemies, jettison, barratry, collision, improper, careless, or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master, or any of the officers or crews of the company's vessels."

The phrase here used, of master and crew "of the company's vessel," must be construed as meaning master and crew of such vessel as the company shall employ, and cannot be restricted to the master and crew of a vessel owned by the company. If, therefore, this condition is valid, it protects the company from liability for the loss which happened.

The contention on behalf of the plaintiff is, that the 12th section of the Regulation of Railways Acts, 1871 (34 & 35 Vict. c. 78) renders this condition void; the contention of [804] the railway company is, that the enactment has not that effect. This is the one issue wrapped up in the voluminous pleadings.

But the construction of this section is not a simple matter. The scheme of legislation adopted in the act of 1871 has been to incorporate that act with several others which it partially alters, amongst others, with the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), and the 31 & 32 Vict. c. 119, s. 16, adopts the language of the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92, ss. 30, 31), without making all the alterations in the language which should have been made. And the 26 & 27 Vict. c. 92 again refers to and brings in the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), itself an obscurely penned statute, though its construction has been finally settled by the decision of this House in *Peek v. North Staffordshire Railway Company* (1), a decision made on the very day when the Railways Clauses Act, 1863, received the royal assent. My Lords, it would be strange if such legislation was not obscure.

(1) 10 H. L. C., 473.

The first matter to be inquired into is, what is the true construction of the Railways Regulation Act, 1868 (31 & 32 Vict. c. 119), s. 16, which applies the Railway and Canal Traffic Act, 1854, to the traffic carried on by railway companies on steam vessels which the railway companies themselves own or work.

The Court of Common Pleas in Ireland, in *Moore v. The Midland Railway Company* ⁽¹⁾, and the Court of Exchequer and the Court of Appeal in England, in *Cohen v. The South Eastern Railway Company* ⁽²⁾, have unanimously held that the whole of the Railway and Canal Traffic Act, 1854, is extended to the whole of the traffic on such steamboats. The judges of the Irish Court of Appeal have, by a decided majority, in the present case, held that the passenger traffic on the steamboats was alone meant, and consequently that only the portion of the Railway and Canal Traffic Act, 1854, applicable to passengers, is incorporated with the later statute, thus including sect. 7. I cannot agree with them.

I will now proceed to state to your Lordships what I consider the material parts of these acts.

The Railway and Canal Traffic Act, 1854, applied to the whole *traffic on railways and canals. The 7th sec- [805 tion was so worded that there was a very unusual diversity of opinion amongst judges as to what it meant. Finally, however, it was settled by the decision of this House in *Peek v. North Staffordshire Railway Company* ⁽³⁾, in conformity with the opinions of the majority of the noble and learned Lords who heard that case argued, that it meant, as the then Lord Chancellor (Lord Westbury) said ⁽⁴⁾, that "no general notice given by a railway company shall be valid in law for the purpose of limiting the common law liability of the company as carriers. Such common law liability may be limited by such conditions as the court or judge shall determine to be just and reasonable; but with this proviso, that any such condition so limiting the liability of the company shall be embodied in a special contract, in writing, between the company and the owner or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person."

But the Railway and Canal Traffic Act, 1854, applied only to traffic on the railway itself, and not to traffic when carried on by means of steamboats or other conveyances in connection with the railway. As it was *ultra vires* in a railway company incorporated by act of Parliament to own or

⁽¹⁾ Ir. Rep., 9 C. L., 20.

⁽²⁾ 2 Ex. Div., 253.

⁽³⁾ 10 H. L. C., 478.

⁽⁴⁾ 10 H. L. C., at p. 566.

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work vessels, railway companies frequently applied to Parliament for powers to own and work steam vessels. I believe there is no instance of their asking for power to own or work sailing vessels, and I suppose, in practice, they never wish to own or work any but steam vessels in connection with their railway traffic. In the Railways Clauses Act, 1863, collecting in one act the provisions usually inserted in acts relating to railways, the 4th part relates to steam vessels, and begins with what, though printed as a part of the 30th section, is obviously a preamble to the whole of the sections in this part, that where a railway company is authorized by a special act, incorporating this part of the act, to own or work steam vessels for hire, then and in every such case. . . . Six sections followed, numbered in the act, 30, 31, 32, 33, 34, and 35. The 30th section relates only to passenger traffic. The 31st section is, in general terms, "the provisions of the Railway and Canal Traffic Act, 1859, so far as the same are applicable, shall extend to the *steam vessels, and to the traffic carried on thereby." My Lords, it does not seem to me to admit of doubt that in a special act, giving what may be called steam powers, and incorporating Part IV of the Railway Clauses Act, 1863, this section 31 must be construed as meaning the whole traffic carried on by the steamboats and not merely the passenger traffic.

In the Regulation of Railways Act, 1868, it was thought fit to extend these provisions to railway companies which had already obtained powers to work steamboats without being put under any restrictions, and also railway companies that should hereafter obtain such powers, without its being necessary to incorporate clauses 30 and 31 of the Railways Clauses Act, 1863, by reference.

Part of the preamble to the 4th part, relating to the incorporation of the clauses in a special act, is struck out; the rest is, less happily, left in. Leaving out verbiage, sect. 16 begins thus: "Where a railway company is authorized to own or work steam vessels for hire, then, and in every such case," and then it repeats sects. 30 and 31, verbatim, but numbers them as one section.

I may here dispose of a point on which great reliance seems to have been placed by the pleaders and by some of the judges below, though I think it was abandoned on the argument at your Lordships' bar. The Midland Railway Company is not authorized by any act of Parliament to own or work steamboats, and therefore, it is said, that this company, if owning and working steamboats, would be doing

so illegally, and therefore would be free from the restrictions imposed, it is said, only on those railway companies legally owning and working steamers. It is impossible to suppose that the Legislature intended those companies who were wrongfully working steamers to be in a better position than those who were rightfully working them; and the act should not be so construed if the words permit of any other construction. And even if the words compelled this construction, I think the railway could not set up its own wrong, against a plaintiff who contracted with the company in innocence and ignorance. Doolan and the Midland Railway Company are not *in pari delicto*. Doolan might perhaps set up against the Midland Railway Company that it was acting illegally, if it would in any way help him (which I do not think it in any way could), but it does not lie in the mouth of the *railway company to set up its illegality, [807 even if it would help it, which I do not think it would.

In *Cohen v. South Eastern Railway Company* (¹) the defendants were themselves the owners of the steam vessel; and they had powers under their acts to hold steam vessels, and therefore this point did not arise. The question, however, whether the Railway and Canal Traffic Act, 1854, s. 7, was brought into the Railway Regulation Act, 1868, s. 16, was there raised; and the judges of the Court of Appeal in England, after having their attention drawn to the opinions of those Irish judges who, in the case now before your Lordships, thought it was not incorporated, expressed a unanimous and unhesitating opinion that it was. My Lords, it was perfectly open here to the counsel for the Midland Railway to argue that the opinion of those Irish judges was right, and that of the Court of Appeal in England wrong. But I think that the decision in *Cohen v. The South Eastern Railway* (¹) was right, and, without repeating the reasons given by Lord Justice Mellish, I refer to them as in my opinion fully justifying that judgment.

But in the present case the Midland Railway Company directors did not own or work the steam vessel. They were not, therefore, brought within the provisions of the Railways Regulation Act, 1868, s. 16. They did, however, under a contract for carrying animals, procure them to be carried in a steam vessel not belonging to the railway company, and the question mainly urged at your Lordships' bar was, whether the Railway Regulation Act, 1871, s. 12, was or was not to be construed as extending the provisions of the Railways Regulation Act, 1868, s. 16, applicable to

(¹) 2 Ex. Div., 253.

railway companies under a contract carrying goods by sea in their own steam vessels, to railway companies under a similar contract procuring them to be carried in steam vessels not belonging to the railway company.

In 1870 the steamer *Normandy*, belonging to the London and South Western Railway Company, was lost at sea with goods and passengers on board, which the London and South Western Railway Company had contracted to carry from London to Guernsey. Then commenced the litigation which was finally decided in *The London and South Western Railway Company v. James* (1) in 1872, after the passing of the Railways Regulation Act, 1871. But the commencement of that litigation was enough to call the attention of the railway interest to this, that a shipowner carrying persons or property in his own ship had, by the Merchant Shipping Acts, in certain cases, his aggregate liability limited to an amount depending on the tonnage of the ship; but that a person, whether railway company or not, contracting to carry passengers by sea, and procuring a shipowner to carry them, had the amount which he could recover over against the shipowner limited, but was himself liable to his contractor for the full amount (unless he had stipulated that he should not be liable farther than he had recourse over), so that their liability was unlimited, their recourse over limited. This was not peculiar to railway companies. The railway interest sought to take advantage of the pendency of the Railways Regulation Bill, 1871, to introduce an enactment making their liability, when they were procuring other shipowners to carry for them, no greater than if they were carrying in their own ship; the burthen of proof that the misfortune happened whilst the goods were on the ship being in the company. This called attention to the fact that the existing Railways Regulation Act, 1868, left railway companies at liberty to impose any conditions when they procured other shipowners to carry for them. It was thought that the restriction on the liberty of contract already imposed on railway companies when carrying the traffic on their own steamers should be extended to such a case; and that if railway companies had contracted to carry partly by rail, partly by steam, and partly by coach or other conveyance on which they might by contract impose any condition, the burthen of proof that the misfortune happened after the goods had got out of the steamship ought to lie on the railway companies.

My Lords, in my opinion both objects were perfectly rea-

(1) Law Rep., 8 Ch. Ap., 241.

sonable, and I think the Legislature intended to give effect to both ; it ought, however, to have expressed its intention in two separate clauses, one for each object. And it is the unfortunate attempt to make one clause serve two purposes that has created the obscurity. Had the Legislature, using as nearly as may be the words actually used, said in one clause: Where a railway company under a *contract [809 for carrying *animals* or *goods* by sea, procures the same to be carried in a *steam* vessel not belonging to the railway company, the railway company shall be answerable in damages in respect of loss or damage to animals or goods, in like manner as the railway company would be answerable if the steam vessel had belonged to the railway company (that is, notwithstanding any condition, unless it was both embodied in a signed contract, and adjudged to be reasonable), provided that such loss or damage happens to the animals or goods during the carriage of the same in such vessel, the proof to the contrary to lie upon the railway company. And by a second clause enacted that: Where a railway company under a contract for carrying *persons*, animals, or goods by sea, procures them to be carried in any ship not belonging to the railway company, the railway company shall be answerable for loss of life or personal injury, or loss or damage to animals or goods, to no *greater* amount than if the ship had belonged to the railway company (that is to say, to an aggregate amount measured by the tonnage of the ship, according to the provisions of the Merchant Shipping Act). Provided that such loss happened during the carriage of the same in the ship, proof whereof shall lie upon the company. If that, I say, had been the wording of the enactments, all difficulty would, I think, have been removed.

As the enactment is actually worded, there is, I think, some difficulty in finding apt words to limit the liability of the railway company for loss of life or injury to the person to the aggregate amount, though I cannot doubt that that was intended. That, however, is not the question before your Lordships.

I think there are quite sufficient words to express the intention of the Legislature, to extend the restriction on liberty of contract to contracts by railway companies to carry by sea, executed by procuring other steamship owners to do the sea carriage. Whether this be politic or not, the Legislature thought it politic. The proviso as to which so much has been said is applicable to this, and to this alone.

As to what seems to have weighed with some of the judges

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below, that the railway company may contrive, by acting as booking agents for the Dublin Steam Packet Company, to evade the act, I can only say that they are free to try. 810] I doubt if it will *be found practicable to have the benefit of an office of their own in Dublin, and, at the same time, to avoid the responsibility. If they succeed in doing so, and in a future Railways Regulation Act a clause is inserted to prevent it, I hope it may be more artistically framed.

The only remaining question is whether this clause is to be adjudged reasonable. The word "servants" in the Railway and Canal Traffic Act, 1854, sect. 7, I think, from the subject-matter of the act, embraces not merely servants properly so called, but also the agents, whom, though not strictly servants, the companies employ to do for them what they have contracted to do. This was the construction put on the same word in an analogous enactment, the 8th section of the Carriers Act: see *Machu v. The London and South Western Railway Company* (*).

And as the condition now before your Lordships tries to exempt the company from all liability for the negligence of its officers and servants, if any condition can be unreasonable, this is. I therefore advise your Lordships to reverse the judgment, and allow the appeal with costs.

THE LORD CHANCELLOR (Lord Cairns): My Lords, this case was argued very elaborately at your Lordships' bar, and at the conclusion of the arguments I think no doubt existed in the mind of any of your Lordships as to the resolution at which we should arrive; but, in consequence of the very considerable complexity of the statutes which are involved, it was thought desirable that some interval should take place before your Lordships' opinion should be expressed.

My Lords, my noble and learned friend has gone, very carefully and with great detail, through the whole of the legislation on this subject, and has expressed a conclusion in which I entirely agree, and although I regret that your Lordships will find yourselves obliged to come to a judgment which differs from that of the majority of the court in Ireland—for with the exception of the late Lord Chief Justice Whiteside, the judges of the Court of Appeal in Ireland were unanimous—still I trust that, after the consideration which the case has received in this House, and 811] after *the great consideration which has been bestowed upon the similar cases which have arisen in this

(*) 2 Exc., 415.

country, this question may now be considered as entirely settled.

My Lords, I quite concur with the motion which my noble and learned friend has made.

LORD O'HAGAN: My Lords, I am of the same opinion. Your Lordships have reason to be obliged to my noble and learned friend who first addressed the House for the careful and lucid exposition he has given of all the statutes bearing on the case before us. It would be idle to repeat that exposition; and I shall follow the example of the Lord Chancellor by simply expressing my full concurrence in the result of it; whilst, from my sincere respect for the learned judges whose views I cannot adopt, I shall formulate, in a few words, the particular conclusion at which I have arrived.

There are substantially two questions for the consideration of the House. A jury has found that the plaintiff's loss resulted from the negligence of the crew of the vessel on which his cattle were embarked by the defendants, to be carried from Dublin to St. Ives; and the first question is, whether the 7th section of the Railway and Canal Traffic Act is incorporated by the 16th section of the 31 & 32 Vict. c. 119? The second question is, Whether sect. 12 of the Railways Regulation Act, 1871, is operative in the circumstances before your Lordships, and entitles the plaintiff to compensation for his loss, although the defendants were not the owners of the steamer in which, for hire, they undertook to transport his goods?

I do not recognize as arguable a third question with respect to the reasonableness of the conditions of carriage under which the defendants seek to shelter themselves from liability. Some attempt was made to raise it, but plainly with little hope of success. The conditions are manifestly unreasonable; and the defendants are answerable, if the sections to which I have referred are applicable to the case. I think they are both so applicable.

The words of the 16th section of the Railways Regulation Act, 1868, "The provisions of the Railway and Canal Traffic Act, 1854, *so far as the same are applicable, shall [812 extend to the steam vessels and to the traffic carried thereby," appear to me sufficient to make those provisions effectively applicable to steam vessels in general and their traffic, whether in goods or in passengers. Reasonably understood, in connection with their antecedents, they are large enough for that purpose; they warrant the imposition of conditions and the acceptance of liabilities identical throughout the performance of a contract which ought to be, and is under-

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stood to be, one, and not split into portions; and I see no reason for being astute to limit their operation, which accords with sound policy and public convenience. They have been accepted, in the more comprehensive sense, by the judges of the Common Pleas in Ireland, and all the judges of the Exchequer and of the Court of Appeal in England. Only a minority of the appellate judges in Ireland have formed a different opinion, and that opinion was scarcely pressed upon your Lordships by the very able counsel who represented the defendants here; and who, avowedly, sustained it from deference to the eminent persons by whom it was declared. Your Lordships may, in my judgment, safely reply to the first question in the affirmative.

As to the second question, looking to the course of legislation from the year 1854 until the year 1871, the policy developed by Parliament in its various stages, and the terms of the 12th section of the Railways Regulation Act, I think that it also must have an affirmative answer. The necessity for dealing with the great monopolies which have altered the whole character of our carrying trade by land and water, so as to guard individual rights, produced the successive statutes of 1854, 1868, and 1871. The first had application only to railways and canals; the second affected companies authorized to build, or buy, or work steam vessels for themselves; and the third was designed to affect them when they should procure the aid of other owners of vessels to carry goods which they had contracted to convey. One purpose runs through them all: to give security, in the new circumstances of society, to persons little able to protect themselves against masterful combinations, by creating restraints and responsibilities unknown to the common law which, in former [813] times, was adequate for their *protection; and those restraints and responsibilities were equally essential, whether the monopolists contracted to carry by land or by sea, in their own vessels or in vessels hired by them, in whole or in part, for the objects of their traffic. In all such cases the social necessity was the same, and the policy of Parliament was identical; and although the 12th section of the act of 1871 is undoubtedly inartistic, obscure, and open to much verbal criticism, I think it sufficiently declares the liability of companies to be the same in transactions which are carried out by themselves, and in transactions in which they employ the instrumentality of others. No one can doubt the object of the section, and as the defendants would have been liable, in spite of their extravagant conditions, if

the vessel had been theirs, they seem to me to be no less liable within the fair meaning of the statute, because, for their own convenience, they thought proper to fulfil a part of the integral contract by putting the plaintiff's cattle aboard a steamer which he did not choose, over which he had no control, and the use of which, in his circumstances, he had no power to reject.

I think that the appeal must be allowed, with costs.

LORD GORDON: My Lords, I quite concur in the opinion which has been expressed by my noble and learned friend on the opposite bench (Lord Blackburn).

The case is decided under statutes which apply to the whole of the United Kingdom, and the case which we are at present considering is an Irish case. There have been no cases in Scotland which have raised directly this particular question, but in the only similar case of any importance which has come before the Scotch courts, the case of *Finlay v. North British Railway Company*, the Scotch courts quite recognized, as they were bound to do, the decision of your Lordships' House in the case of *Peek v. The North Staffordshire Railway Company* (¹), and they also held that the justice and reasonableness of any conditions sought to be imposed by any railway company was a matter within the province of the court alone, and that it might vary according to circumstances. *I have no doubt whatever [814 that your Lordships' judgment will prevent litigation with reference to any matter of the same kind in future.

Judgment of the Court of Exchequer Chamber in Ireland reversed; and judgment of the court of Common Pleas in Ireland restored, with costs.

Lords' Journals, 27th July, 1877.

Solicitors for appellant: *Sherwood, Grubbe, Pritt & Cameron.*

Solicitors for respondents: *Carlisle & Ordell.*

(¹) 10 H. L. C., 473.

As to doctrine of *ultra vires*, see 6 Eng. Rep., 17 note; 11 Eng. R., 483 note; 13 Eng. R., 756 note; 14 Eng. R., 81 note; *Whitney Arms Co. v. Barlow*, 63 N. Y., 62, reversing 38 N. Y. Superior Court Rep., 554; *Ogdensburgh, etc., v. Vermont, etc.*, 6 N. Y. Supreme Court R. (Thomp. & Cooke), 488, S. C. on merits, 4 Hun, 712; *State, etc., v. Citizens, etc.*, 47 Ind., 407; *Coldwater v. Tucker*, 36 Mich., 474.

One who contracts with a municipal corporation is bound to know whether

the contract is according to the provisions of its charter, and if not he cannot recover upon a *quantum meruit*: 6 Eng. Rep., 18 note.

Indiana: *Browning v. Owen Co.*, 44 Ind., 11.

See *Newman v. Sylvester*, 42 Ind., 106, reversing 1 *Wilson's Superior Court R.*, 19.

Kentucky: *Craycraft v. Selvage*, 10 Bush, 696.

Michigan: See *Coldwater v. Tucker*, 36 Mich., 474.

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Missouri: Cheeny v. Brookfield, 60 Missouri, 53; Leathers v. Springfield, 65 Mo., 505; Perkinson v. St. Louis, 4 Mo. App. R., 323.

New Jersey: State v. Paterson, 39 N. J. Law R., 489, 492, reversing S. C., id., 72.

New York: McDonald v. Mayor, etc., 68 N. Y., 23; Parr v. Greenbush, 6 N. Y. Weekly Dig., 547, Court Appeals; Swift v. Williamsburgh, 24 Barb., 187.

See Nelson v. Mayor, 68 N. Y., 535; In re Zborowski, 68 N. Y., 88.

As to right of a carrier to contract for a restricted liability, see 13 Eng. R., 152 note; 14 Eng. R., 618 note; 17 Eng. Rep., 174 note; Magnin v. Dinsmore, 70 N. Y., 410; Mynard v. Syracuse, etc., 71 N. Y., 180; Kirby v. Adams Express Co., 2 Missouri App. Rep., 369; Woodruff v. Sherrard, 9 Hun, 322; Christenson v. Am. Exp. Co., 15 Minn., 271, 2 Am. Rep., 122; Claxton v. Dickson, 27 U. C. Com. Pl., 170; Merchants, etc., v. Cornforth, 8 Colorado, 280.

As to when a carrier contracts for the carriage of property to its destina-

tion, though beyond the terminus of its route, see 14 Eng. Rep., 275 note; Southern Express Co. v. Heas, 53 Ala., 19; Adams Express Co. v. Wilson, 81 Ill., 339; Erie Railwa Lockwood, 28 Ohio St. R., 358; Rennie v. Northern, etc., 27 U. C. Com. Pl., 153; Gordon v. Great Western Railway, 25 U. C. Com. Pl., 488.

The rule may be stated generally, that where the first carrier, who is bound to carry only to the terminus of his route, contracts for a restricted liability, such contract does not enure to the benefit of a connecting carrier, unless it be expressly provided thereby that it shall: Gordon v. Great Western Railway, 25 U. C. Com. Pl., 488.

When several connecting carriers associate and form what is to the shipper a continuous line, which they divide among themselves, they are jointly and severally liable to the shipper with whom they have contracted for a loss on any part of the line: Wyman v. Chicago, etc., 4 Mo. App. R., 35.

For what injuries to animals by other animals a carrier is liable, see 2 Eng. Rep., 704 note; 15 Eng. R., 217 note.

[2 Appeal Cases, 814.]

H.L. (1.), June 15, 18; July 30, 1877.

[HOUSE OF LORDS.]

HUGH O'RORKE, Appellant; and JOHN JOSEPH BOLINGBROKE, Respondent.

Sale of Reversion—Undervalue—Infant—Professional Assistance.

Mere inadequacy of price will entitle an expectant heir to apply to the Court of Equity to set aside (on terms) the sale of a reversion, and the onus of proving the transaction fair, and the price sufficient, is on the purchaser.

The repeal of the Usury Laws has not affected the jurisdiction of the Court of Chancery to give adequate protection, in such cases, to expectant heirs, or persons under pressure.

A settlement of an estate made on the marriage of J. B. and M. L. charged a sum of £300 a year as an annuity in favor of the intended wife for her life, and a sum of £3,000 for portions for younger children. There were six younger children. J. B. got into money difficulties, and disposed of his own interests in the estate. The eldest son of J. B. became possessed (his father being still alive) of the estate itself, and sold it to O'R., subject to the charges upon it for the wife's annuity, and the children's portions. Some of the children sold their expected portions to O'R., and to another person, for varying sums of money. J. B., the father, proposed to O'R. to purchase the portion of John, the youngest but one of the family. The father was then sixty-one years of age, and a stockbroker (who knew nothing of the state of J. B.'s health) valued the portion (£500) at £326. O'R. refused to give more. The negotiations for the sale lasted some weeks, the son all that time residing with the father at Dover. The son came of age on the 11th of April, 1870, went over to Ire-

land on the 18th of April, saw O'R. and his solicitor on the 20th of April, saw the deed on the 28th of April, was stated to have examined it, and expressed his approval of it (but that *was denied), and executed it on the 30th of April, 1870. He [815 never had a separate solicitor, or any one to act for him in the character of an independent adviser. The purchase-money was to be paid by yearly instalments. These were regularly paid till the end of 1874, and accepted by the son. At that time the son filed his bill to set aside the sale as fraudulent and void, and to have an account. The Master of the Rolls in Ireland had dismissed the bill; the Court of Appeal reversed that decision :

Held, by LORDS BLACKBURN and GORDON, that, there being no evidence of fraud, the bill could not, under the circumstances, be sustained, and the decision of the Court of Appeal in Ireland was reversed.

Dis., LORD HATHERLEY, who was of opinion that though there was no evidence of fraud or misconduct on the part of the purchaser, still that the circumstances of the case brought it within the rule of equity, that protection ought to be afforded to expectant heirs in cases of this kind, and that, as the young man here had not had the protection of a separate and independent adviser, the whole transaction must be opened.

THIS was an appeal against a decision of Lord Chancellor Ball and Lord Justice Christian in the Court of Chancery in Ireland, by which a previous decision of the Master of the Rolls there had been reversed.

The facts were these: On the 31st of July, 1830, a settlement was executed on the marriage of John Bolingbroke, of Old Castle, in the county of Mayo, and Miss Sarah Lynch, of the county of Galway, by which, after settlement of an annuity of £300 for the benefit of the lady, and other matters, there was a charge of £3,000, expectant on the death of John Bolingbroke, created upon the settled estate for the benefit of the younger children of the marriage. There were six younger children, who therefore became entitled to a sum of £500 each, thus charged upon the estate. Mr Bolingbroke fell into difficulties, and in 1866 his wife, Mrs. Bolingbroke, released her annuity of £300 a year, in consideration of being secured £200 a year for her separate use for life, her husband becoming entitled to the same annuity for his life, if he should survive her. Some of the children parted with their claims to the sum of £500 (part of the charge of £3,000) expectant on the death of their father, in consideration of sums of money agreed upon as the purchase value of their individual shares. Miss Lynch Bolingbroke, the eldest of the younger children, and one of her brothers, Charles Bolingbroke, sold theirs to Colonel Knox Gore for the sum of £275 each. The father was said to have been concerned in negotiating these sales. In *April, 1866, [816 the eldest son, Joseph Bolingbroke, having acquired the fee simple of the estate, sold (in the Landed Estates Court) the Old Castle estate itself to the appellant, it being then subject to his mother's annuity of £200 and to the charge of the £3,000 for the younger children. In November, 1866, Miss Sarah Bolingbroke sold her £500 share of the charge

to the appellant for £250. Mrs. Sarah Bolingbroke (the mother) died in September, 1869, and the elder Bolingbroke (who then became entitled to his wife's annuity for his own life) and his daughter went to reside in Dover, having removed thither from Boulogne. By a deed of February, 1870, the father sold to the appellant one half of the annuity, amounting to £100 a year, for the sum of £710, the greater part of the consideration for which consisted of moneys previously advanced to him, from time to time, by the appellant. The sale of the respondent's portion of the charge of £3,000 was suggested to the appellant by John Bolingbroke, the respondent's father, and was conducted between them by letters. The negotiation began in July, 1869, and to the suggestion the appellant answered that he had "no objection." The matter did not appear to have been again mentioned till the 4th of March, 1870, when Mr. Bolingbroke wrote: "My son John will attain his majority on the 11th of April, and wishes to dispose of his charge, to enable him to attend medical lectures; say what you are willing to give him for it." Mr. O'Rorke answered on the 7th of March: "Referring to your son's claim on the estate, you know what I paid for the last, also whatever increased value there may be in his claim." On the 31st of March Bolingbroke wrote: "His charge of £500 he is willing to part with for £400, to be paid to him yearly, half-yearly, or quarterly instalments, in whatever amount may be necessary for his support and payment of fees for attending medical lectures, say, about £75 a year, more or less." Mr. O'Rorke applied to a Mr. Fox (who was in fact a stockbroker, but whom he afterwards erroneously described as a notary), and received this answer from Mr. Fox: "The present cash value of £500 payable on the death of a life now aged 61 is £326 5s." Mr. O'Rorke on the 4th of April sent this statement of value to Mr. Bolingbroke accompanied by Mr. Fox's indorsement thereon, made in these words: "Your own intelligence will suggest to you *making better terms if you can." In a letter on the 6th of April Bolingbroke adhered to the sum of £400, observing that "as the payments quarterly embrace a period of five years you will not fail to see the policy of preventing the transfer of his charge to a third party." In the same letter he suggested to O'Rorke the making "an advance on my youngest son's charge." O'Rorke answered on the 8th of April: "I will not give one fraction more than that of the valuation, your son paying the attorney's costs, but in order to meet your views and your son's interest, I will advance him £75 or

£80 per annum, giving him bank rate of interest on whatever I may hold, until all is drawn." On the 9th of April Bolingbroke wrote: "My son agrees to your terms in every respect save costs, and desires, if you are satisfied to bear him scathless in respect to them, that you will have the deed prepared accordingly, and he will proceed to Dublin immediately after Easter and execute the deed. He desires me to add he will feel obliged by your kindly remitting him £10 in advance to cover travelling, &c.;" and there was then an application for an advance for an outfit for the youngest son. O'Rorke answered this letter by sending £10 for the respondent, but wrote: "I think you should not have any hesitation about costs, as the arrangement is quite an accommodation, and besides allowing you interest, when I need not." On the 13th of April Bolingbroke wrote: "I received your letter and check for £10 for account of my son, for which we are greatly obliged," renewing at the same time his scheme for an advance for an outfit for the youngest son. During all the time of this correspondence John Bolingbroke, jun. (the respondent), resided with his father at Dover. The deed for the sale of the charge was prepared by Mr. McCully, the solicitor for Mr. O'Rorke, who had acted as such in the previous matters. The respondent became of age on the 11th of April, 1870. On the 18th of April he arrived in Dublin, and on the 20th of April had an interview with the appellant and Mr. McCully, and gave them the name of the Rev. Mr. Durcan as that of the person who could send the baptismal certificate to show the respondent's age. Mr. Durcan, on being applied to, did send it. There was contradictory evidence as to whether Mr. McCully had suggested that the deed should be sent to another solicitor to examine it on the *part of the [818 respondent. On the 28th of April, the deed being then prepared, the parties met again, and, as it was alleged on the part of the appellant, but not admitted by the respondent, the deed was read over to the respondent, and examined and read by himself and approved. They met again on the 30th of April, and the deed was executed. The payments agreed upon were regularly made till the end of 1874, when the respondent gave notice of his intention to open the whole transaction, and on the 11th of January, 1875, he filed his bill praying that the deed-poll might be declared to be fraudulent and void, and be ordered to be delivered up to be cancelled; and for accounts of what was due to him in respect of the said charge of £500, after allowing the appellant all just credits, &c. An answer was put in, and

affidavits filed, and witnesses examined. Some of these witnesses were medical men, who deposed to the bad condition of the health of the father in 1869 and 1870. It did not appear that the appellant knew of this state of the father's health, and the father, when negotiating with the appellant as to the purchase of another interest, had described his own health to be good.

The Master of the Rolls thought that no case had been made out for the bill, and ordered it to be dismissed with costs. On appeal, Lord Chancellor Ball and Lord Justice Christian reversed this order, and made an order in accordance with the prayer of the bill. This appeal was then brought.

Mr. *Jackson*, Q.C., and Mr. *Adair Phillips* (both of the Irish bar), for the appellant, insisted that everything had been done fairly, and that there was no ground whatever to invoke the interference of a court of equity, or to question the validity of the deed. The negotiations had commenced at the suggestion of the father, the natural guardian of the son; the son himself had taken part in the business; had seen the deed and come two days afterwards to execute it; and no deception had been practised on him by the appellant. He knew of everything as it went on; he had had full opportunity of considering the sale; and, finally, he had from April, 1870, till the end of 1874 acted upon the deed and received the payments therein stipulated to be made. Value and undervalue, though important to [819] be considered, were not the sole *tests of the property of a sale even of a reversion, and where, as here, there was no pretence for raising the imputation of fraud, even undervalue itself would not be regarded: *Harrison v. Guest*(¹); *Sugden's Vendors and Purchasers*(²). *Salter v. Bradshaw*(³) and *Foster v. Roberts*(⁴) did not apply here, if indeed the rule stated in the latter of them(⁵), "that the burden of proof lies upon the purchaser of a reversionary interest to establish that he has given the full and complete value for it," can be sustained. In the former the Master of the Rolls relied much on the fact that at the time of the sale no pains had been taken to ascertain the real value of the thing purchased. Here that was done, and the value fairly stated, and opportunity for consideration offered, and the terms agreed to after time taken for consideration. In *Aylesford v. Morris*(⁶) fraud was much relied on; no ap-

(¹) 8 H. L. C., 481.

(²) 14th ed., c. 7, s. 1, par. 20.

(³) 26 Beav., 161.

(⁴) 29 Beav., 467.

(⁵) 29 Beav., at p. 471.

(⁶) Law Rep., 8 Ch. Ap., 484.

plication was there made to the father. Here the father was the first proposer of the purchase, and the negotiator of the transaction. The son was residing with him all the time, and everything was done with his knowledge, if not actually through his agency: *King v. Hamlet* (*). There was no disguise, no concealment, no attempt to take advantage; on the contrary, everything was fairly done; the father proposed the sale, Mr. O'Rorke consented to purchase, fairly told what he was advised the portion was worth, agreed to give that and refused to give more; and was, after all that, requested to conclude the purchase, did so, and exactly performed all the conditions which had been deliberately agreed upon.

Mr. *Higgins*, Q.C., and Mr. *Monck* (of the Irish bar), for the respondent: The price paid here was really an under-value. The life of the father was at the time a bad life, and in fact the reversion fell in from that cause within three months afterwards, so that inadequacy of price was manifest.

It is a settled rule of law that expectant heirs are to be protected in making sales of reversions. There was no such protection here. The father did not afford it. He obtained part of the money *which was in form, but in form [820 only, advanced for the benefit of the son. The appellant knew the circumstances of the father, knew how the father had parted, bit by bit, with all interest in the property, and must have known that the father was not the person to afford protection to the son, and it therefore became the appellant's duty to warn the young man to take the advice of some person competent to give advice, and disinterested enough to give it fairly; and he had no right under such circumstances to continue the negotiation while the son was unprovided with professional aid. The rule as stated in *Evans v. Llewellyn* (*) was disregarded. That rule was, that such a transaction as this, even though there was no misrepresentation or actual fraud, could not be sustained, where the vendors of the property were in circumstances to require assistance and protection, but acted without any. That rule was emphatically approved of by Lord Justice Turner, in *Baker v. Monk* (*). This respondent was not "competent to protect himself," and therefore he ought to have been protected. Actual fraud, in the ordinary application of the word "fraud" was not required. In such a case as this fraud means "an unconscientious use of the

(*) 2 My. & K., 456; 3 Cl. & F., 218. (*) 1 Cox, 333; 2 Bro. C. C., 150.

(*) 4 De G. J. & S., 388, at p. 392.

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power arising out of the circumstances and conditions" of the parties⁽¹⁾. In the interest of expectant heirs selling reversions, the court would imply fraud where there was undervalue. That had been done in *Salter v. Bradshaw* (²), and in *Foster v. Roberts* (³). The principle of the courts of equity to protect the weak and the unprotected was acted on in this House in *Smith v. Kay* (⁴), and it was there expressly said that that protection would not be confined to cases of a fiduciary nature. In the purchase of a reversion the purchaser must show that he gave full value for it, and all the parties must conduct their dealings on equitable grounds: *Wood v. Abney* (⁵); *Longman v. Ledger* (⁶); *Clark v. Malpas* (⁷). In the last named case, a purchase from a poor sick man, shortly before his death, at an undervalue, he being without due protection, was set aside at the instance 821] of his *heir-at-law. The same principle of the necessity of giving protection in cases of this sort was acted on in *Croft v. Graham* (⁸) and in *Miller v. Cook* (⁹), though in this latter case a solicitor had actually been employed when the transaction took place. *Tyler v. Yates* (¹⁰) was to the same effect, and these last mentioned cases had expressly declared that the repeal of the usury laws had not in the least affected the jurisdiction of the Court of Chancery in such matters.

It is not enough here to say that the father began the transaction, that he knew all the circumstances, and that he was the natural guardian and protector of the son, and that the son having the means of his protection could not now impeach what had been done with his sanction. This sort of argument was founded upon the observations of Lord Chancellor Brougham in *King v. Hamlet* (¹¹). But in *Talbot v. Stainforth* (¹²) Vice-Chancellor Wood had commented on those observations as not being necessary for the decision of that case; and they were for another reason inapplicable here, for the circumstances of this case showed beyond doubt that the father had not been acting as the adviser and protector of the son, and that, consequently, the son had been in a situation to require efficient advice and protection. Here, too, the solicitor of the appellant had prepared the deed; it had never been seen by any independent

(¹) Per Lord Selborne, C., in *Aylesford v. Morris*, Law Rep., 8 Ch. Ap., at p. 491.

(²) 26 Beav., 161.

(³) 29 Beav., 467.

(⁴) 7 H. L. C., 750.

(⁵) 8 Madd., 417.

(⁶) 2 Giff., 166.

(⁷) 81 Beav., 80; 4 De G. F. & J., 401.

(⁸) 2 De G. J. & S., 155.

(⁹) Law Rep., 10 Eq., 641.

(¹⁰) Law Rep., 6 Ch. Ap., 665.

(¹¹) 2 My. & K., 466; 3 Cl. & F., 218.

(¹²) 1 J. & H., 502; 31 L. J. (Ch.), 197.

adviser on the part of the respondent, and the death of the father so early after the date of the purchase, showed that the price given for the charge was a price wholly inadequate. Under all these circumstances the transaction could not be allowed to stand.

Mr. Jackson replied.

LORD HATHERLEY: My Lords, in consequence of my having the misfortune to differ in opinion from the rest of your Lordships with reference to what, in my view, should be the ultimate determination of this case, I have thought it necessary to enter, at rather greater length than *I [822 otherwise should have done, into those decisions and rules by which the Court of Chancery has been governed in regard to the dealings of persons whom the court thinks to be in need of its special protection and care, with reference to interests which other persons may obtain in their property, without, as it appears to the court, sufficient consideration or advice on the part of those who are in need of special protection.

My Lords, the Court of Chancery assumed jurisdiction, at a very early period, to set aside transactions in which expectant heirs had dealt with their expectations, when the court was satisfied that they had not been adequately protected against the pressure put upon them by their poverty.

The early cases may be found collected in a note to *Davis v. The Duke of Marlborough* (¹), in which note a full account is given of the case of *Berny v. Pitt* (²) before Lord Nottingham. A strong instance of the length to which the doctrine of inadequacy of protection was carried may be found in *Wiseman v. Beake* (³), where the plaintiff, an expectant heir, was nearly forty years old, and was a proctor. There was at first considerable oscillation of opinion upon this jurisdiction, as is shown by Lord Keeper Guildford having, in *Nott v. Hill* (⁴), reversed a decree of Lord Nottingham, which decree of reversal was itself reversed by Lord Chancellor Jeffreys. Lord Guildford, in giving judgment, says: "If it be to be decreed a law in Chancery that no man must deal with an heir in his father's lifetime, that were something." He was obviously dissatisfied with the doctrine; nevertheless the doctrine was established, and from that time it has been finally settled that mere inadequacy of price would entitle an expectant heir to set aside (on terms) the sale of a reversion; and farther, that the pur-

(¹) 2 Sw., 108, 139, n.

(²) 2 Vern., 14.

(³) 2 Vern., 121.

(⁴) 1 Vern., 167.

chaser is bound to establish the fact that the transaction was fair and the consideration given was sufficient.

This doctrine at first was applied to all cases of expectancy on the death of parents, and was afterwards extended to the sale of any reversion, till a recent statute was passed declaring it not to be necessary for the purchaser to undertake the burden of proving the adequacy of price, where 823] the transaction is otherwise fair. *But it was held in *Croft v. Graham* (1) that the repeal of the usury laws in no way affected the jurisdiction of the court in reference to dealings with expectant heirs; and it has been held in like manner by Lord Chancellor Selborne and Lord Justice Mellish in *Lord Aylesford v. Morris* (2), that the act with reference to the sale of reversions (31 Vict. c. 4) does not present any bar to the relief given in equity on sales by expectant heirs. I think both these decisions were correct.

It sufficiently appears that the principle on which equity originally proceeded to set aside such transactions was for the protection of family property; but this principle being once established, the court extended its aid to all cases in which the parties to a contract have not met upon equal terms. In ordinary cases each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of the "expectant heir," or of persons under pressure without adequate protection, and in the case of dealings with uneducated ignorant persons, the burthen of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract. *Evans v. Llewellyn* (3) (cited before your Lordships in the argument) is a strong instance of this. Lord Kenyon, then Master of the Rolls, set aside a contract, notwithstanding full explanation to the plaintiff of his rights, which were, moreover, rights in possession, upon the ground of want of due protection. He says: "Here is a man destitute of money, and 200 guineas are suddenly offered him, which to a man in his circumstances is a very important sum, and he is then called upon to convey an estate in prejudice of himself and his family for the benefit of a person in affluent circumstances. It is said he was cautioned by Mr. Medlock the defendant's solicitor). It is true, and so far the parties did right, but they should not have permitted the man to have made the bargain without going to consult his friends."

The case of *Clark v. Malpas* (4), affirmed on appeal to the

(1) 2 De G. J. & S., 155.

(2) Law Rep., 8 Ch. Ap., 484.

(3) 1 Cox, 333; 2 Bro. C. C., 150.

(4) 31 Beav., 80.

Lord Justices Knight Bruce and Turner ('), is another instance *of the extension of the protection of the court [824 to a case of a man of full age and in possession, on the ground of surprise and inequality of position.

Now, what are the circumstances of the case before us? The appellant, Mr. O'Rorke, had in 1866 become the purchaser of an estate in Ireland, which had originally been settled, on the ordinary trusts, upon the marriage of the respondent's father and mother (the Bolingbrokes), and the respondent was entitled, as one of the six younger children of the marriage, to a charge of £500, to be raised on the death of his father, whose original life estate had been conveyed to the eldest son subject to an annuity of £200 for the life of his father and mother, and the survivor of them, and to the portions of the respondent and other younger children. The appellant had become owner of the whole estate by means of a purchase made in the Landed Estates Court, subject to these charges.

The appellant, being thus interested in the estate, entered into various transactions with John Bolingbroke, the father of the respondent, for the purchase of a part of the annuity which formed nearly his whole source of support, and for the purchase of the portion of Sarah, one of the six younger children; and it cannot be doubted that at the date of the transactions impeached by the respondent's bill in this suit, the appellant was well aware of the great poverty of the father and of the family. But I think it right to say that I see no evidence whatever of a deliberate, fraudulent intent on the part of the appellant to oppress and injure the father or the children, or to do anything more than to free the estate he had purchased from its remaining incumbrances, on the best terms he could make. John Bolingbroke (the father), as far as we can know from any evidence in the cause, was able to employ, and for all that we know did employ, competent advisers; and, at all events, it does not appear to me that your Lordships should assume that any of the dealings between him and the appellant referred to in the bill, which were not questioned in John Bolingbroke's lifetime, were unfair or open to attack. The only observation, then, that I make upon these transactions is, that the appellant was certainly aware of the state of poverty to which the father and his family were reduced. In the dealings *with the father for portions of his annuity, the ap- [825 pellant appears to have given full value, on the footing of

(') 4 De G. F. & J., 401.

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his life being a good life, and the father represented his own health to the appellant to be sound and vigorous.

The respondent attained his age of twenty-one on the 11th of April, 1870, and shortly before this, viz., on the 4th of March, 1870, the father wrote to the appellant (with whom he was in correspondence about the sale of a portion of his annuity) a letter containing this passage: "My son John will attain his majority on the 11th of April, and wishes to dispose of his charge to enable him to attend medical lectures. Say what sum you are willing to give him for it." The appellant, in answer to this letter, on the 7th of March writes thus: "Referring to your son's claim on the estate, you know what I paid for the last" (alluding to Sarah's portion of course), "also whatever *increased value* there may be in his claim," alluding, doubtless, to the age, and possibly, also, to the health of the father. On the 31st of March the father writes to the appellant, asking £400 for the reversionary interest in £500, to be paid by instalments, so as to meet the son's requirements of £75 annually, for lectures and maintenance.

On the 2d of April the appellant writes to the father, saying, "The present cash value of £500, payable on the death of a life now aged sixty-one, is £326 5s." On the 4th of April he sends another letter inclosing the valuation by Mr. Fox (mistakenly said to be a notary) at the sum before-mentioned, and sends with it a memorandum by Mr. Fox, saying, "Your own intelligence will suggest to you making better terms if you can." On the 6th of April the father writes, adhering, as far as he can, to the original proposition, saying, "It did not require the notary's assurance to satisfy me, that in your proposition you did not seek an unfair advantage, or, as you plainly put it, to make a job of my son's claim; at the same time I am sure you must admit that the terms I mentioned were not only equitable but easily obtainable." The appellant in reply on the 8th of April, 1870, states, that he "will not give one fraction more than that of the valuation, your son paying the attorney's costs;" but he offers to accommodate the father by paying the son an annual allowance of £75 or £80, and interest on the unpaid part of the valuation. In all this cor-
826] response *no direct allusion is made to the father's state of health, but it seems to be taken for granted that he was in a sound state of health, and it was upon that supposition, as I have already said (this is, no doubt, in favor of the appellant), that the appellant had been dealing with him

in reference to the previous purchase of the interest in the annuity.

On the 9th of April the father writes, "My son agrees to your terms in every respect save costs, and desires, if you are satisfied to bear him scathless in respect of them, that you will have the deed prepared accordingly, and he will proceed to Dublin immediately after Easter to execute the deed. He desires me to add he will feel obliged by your kindly remitting him £10 in advance to cover travelling, &c." Your Lordships will observe that the father undertakes to make this agreement for his son on the 9th of April, just two days before his son had attained his age of twenty-one years. He then begins an inquiry as to a purchase of the portion of his youngest child, not then of age. On the 11th of April the respondent had then attained his age, and the appellant writes declining to be at a "penny costs," and suggesting that, as the matter is one of accommodation, "besides allowing you interest, which I need not," this should not be asked. I stop there to observe this, it presses very hardly upon the appellant; at the same time one does note that he made an error in saying that he ought not to be fixed with the costs of the transaction on the ground of his allowance of interest, being a matter of favor and accommodation. Of course he was bound to allow interest upon the purchase-money which was due at once, although for the convenience of the parties it was paid by instalments. He was naturally bound to pay interest upon that, and he could not insist upon his having done so as a reason for not taking on himself the costs of the transaction.

The respondent came of age on the 11th of April, 1870, and on the 18th went to Dublin. The appellant had sent as requested £10 to the father, who gave his son £3, and retained the rest, possibly paying for the expense of the journey. The respondent saw the appellant on the 20th of April. In the course of conversation the appellant inquired after the health of the respondent's father, and the respondent answered that "he was very unwell." *The appel- [827
lant says it was made as an ordinary complimentary inquiry, and he cannot recollect the exact answer; he does not deny the statement of it. I ought, perhaps, to observe that one of the learned judges in one of the courts below, the Master of the Rolls, who decided in favor of the appellant and against the respondent, says that O'Rorke was examined in his presence, and he thought from his statement that there was no reason to doubt his assertion that this statement appeared to him to be a casual inquiry, and had not made any

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great impression upon him. It appears that Mr. McCully (the appellant's solicitor) prepared the deed by which the assignment of the respondent's reversionary interest was carried into effect. The appellant suggested the employment of a solicitor by the respondent, and named a Mr. McDermott for that purpose, but the respondent refused to employ him or any one else.

The deed prepared by Mr. McCully is certainly not such as would have been prepared or sanctioned by a legal adviser of the respondent, but I do not look upon this as material to the case. I do not myself think that it was done with any special intent; on the contrary another solicitor was recommended, and that other solicitor not being to be had Mr. McCully took upon himself to act—it would have been better if he had not done so—but he did take upon himself to act, and acted in a manner somewhat more favorable to the appellant than he should have done. The respondent executed this deed and paid the £10 costs charged for it; not perhaps immoderate in amount. The material fact is, that the respondent had no one to suggest to him the importance of ascertaining and considering his father's state of health.

At the first interview with the respondent the appellant advanced him £3, but refused to advance any more "until the transaction should be completed," thinking (as he says) that the respondent ought not to require money after £10 had been sent to his father. In fact the respondent must at this time have been without any money, having received only £3 from the £10 forwarded to his father. The deed was executed on the 30th of April, 1870, and payments were made under it down to the last instalment but one in 1874.

The above were the circumstances under which the trans-
828] action *took place. On the 4th of July, 1870, less than three months after the conclusion of the matter, the respondent's father died; and the consideration paid was far less than would have been the value had the state of health of the father been taken into consideration at the time of the sale of the respondent's interest.

The state of the father's health is represented by the witnesses as follows: Sarah, sister of the respondent, says her father was very unwell when the respondent went to Ireland, and continued to be in ill-health until his death. Dr. Perrochaud, a physician at Boulogne, attended Bolingbroke, the father, in the year 1868, and during his last year of residence at Boulogne, which was in 1869. He speaks

of the father's intemperate habits, and consequent palpitation of the heart, and of his bursting a blood-vessel, after which time he considered his life a bad one. Mr. Ottaway, a medical practitioner at Dover, attended the father several times, commencing in November, 1869, then in May and June, 1870, and down to his death in July of that year. On each occasion he was found to be subject to derangement of health, "probably from drink;" he certified his death to be occasioned by syncope of the heart. Adams, a chemist at Dover, gives evidence to the same effect. He attended him also from time to time from about the period of this transaction up to his death.

I do not think that there is any evidence of the appellant's being aware of this state of the father's health; on the contrary, he dealt with the father—when purchasing of him portions of his annuity—as being in good health, and the father had boasted to him of such being the case.

Upon the consideration of all the facts of the case, the Master of the Rolls in Ireland held that it fell within the principles laid down by Lord Brougham in *King v. Hamlet* (¹), on which I had (when Vice-Chancellor) occasion to comment in *Talbot v. Stainforth* (²). I conceived the principle laid down by Lord Brougham to be that where the heir deals, not behind the back of his father, but with his sanction and assistance, and has all the protection which his father can give him, he is not entitled to relief as if the contract had been entered into without such parental protection. The case of *King v. Hamlet* (¹) was a very remarkable one, and *I cannot concur with the Master of [829 the Rolls in applying the doctrine above stated to the present case.

It is quite true that in the present case his father endeavored to obtain as good a bargain as he could for the son, and I think we have no reason to suppose that the bargain was unfair in the sense of attributing to the appellant knowledge of the state of the father's health. Nor do I see that the value given would have been inadequate had the father been in good health. But, as I have observed upon the authorities, the court protects "expectant heirs," or those dealing for the sale of expectancies against "catching bargains," that is, against the consequences of their not being on equal terms with the buyer, or in a position fully to understand the value of their interest, and justly to estimate the proposals made to them: *Evans v. Llewellyn* (³),

(¹) 2 My. & K., 456; see 3 Cl. & F., 218.

(²) 1 J. & H., 484.

(³) 1 Cox, 338; 2 Bro. C. C., 150.

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cited above, and *Clark v. Malpas* (¹), are instances of this kind. As Lord Kenyon said in *Evans v. Llewellyn* (²), "I think that the young man should not have been allowed to act without independent advice." Any independent adviser consulted by him, would have asked, as his first question, 'What was the state of health of his father?' The appellant himself (if not interested) would have seen, when informed that the father was "very unwell," that such a fact materially affected the value of the annuity. The father was the last person to perceive what was, in this respect, his own position, and the importance of the inquiry to the son's interest. In dealing for the sale of his own annuity, the father's interest lay the other way, and he would not wish to show to O'Rorke that he had misrepresented his state of health. An independent adviser, had he known what the father's health was, would certainly have made better terms, if he had not probably suggested a loan in lieu of a sale of the young man's interest. The son was fettered by the bargain made by the father, in his name, before he was himself competent to contract; and I hold that the appellant, being conscious of the youth's having only just attained his age of twenty-one, was bound to establish the fairness of the contract. Inadequacy of price is not alone sufficient to authorize the vacating of a contract for the sale of a reversion, but inadequacy of price, coupled with the 830] inexperience and absence of any competent *advice on the part of the seller, are sufficient to set in motion the protective powers of the Court of Equity. The advice required was not even that of a professional man. Any man of business would have informed the respondent of the elements of value on a sale dependent upon the expiration of a life, namely, whether the life was of average value or not; and if no such friend could be found, the contract should not have been entered into.

I think, therefore, that the exemption from the application of the general doctrine of the court, which the circumstances of *King v. Hamlet* (³) furnish, cannot be extended to this case; though I cannot concur in the strong observations made by one of the judges in the court below on the conduct of the appellant in respect of a series of transactions which have not been questioned in this or any other suit. I have, however, thought that this was not a case in which the contract could be maintained consistently with the doctrines of the Court of Equity. I feel a dread of in-

(¹) 81 Beav., 80.(²) 1 Cox, 333; 2 Bro. C. C., 150.(³) 2 My. & K., 456; see 3 Cl. & F., 218.

vading those doctrines in the very slightest degree, and I feel strongly the extreme importance of maintaining the protection afforded to young men which they so greatly need in dealing, as this young man did, while utterly inexperienced with their expectancies; and I cannot but come to the conclusion that Mr. O'Rorke's error has been this: He may well have supposed that the father, when the annuity was purchased, was in good health—he may possibly not have paid much attention, though probably, if he had not been a purchaser, he would have paid a little more attention, to the remark of the young man that his father was “very unwell;” but I think that he should not have permitted the young man, without the presence of some independent adviser to protect him, to enter into such a contract. If it is asked whether young men cannot enter into contracts for the sale of their expectancies under any circumstances, I say, Yes, they can enter into such contracts and engagements as the court would enter into for them; that is to say, such contracts and engagements as may be for their benefit, being at the time aware of every circumstance which contributes to the full knowledge or estimate of the value of the property which is being dealt with. But I say, on the other hand, that those contracts cannot, with a due regard to the *principles of the Court of [831 Equity, be sustained where this knowledge did not exist. If this had been a case in which the young man was entitled to £500 now in the hands of the Court of Chancery subject to the life estate of his father, and if there had been the same dealings as here, and O'Rorke had upon the father's death petitioned to have that sum paid out of court, I cannot conceive that that fund would have been paid out of court, to the prejudice of the young man who had so parted with his interest in that property.

Before parting with the case, especially as your Lordships take a different view from mine upon the matter, I think I ought to say, and I do say, that I regret extremely the course which has been taken with regard to this young man's interests. I do not think that the suit could possibly in any way have been of any real benefit to him (I do not know to whose advantage the suit could have been) when you consider all the expense which must have been incurred; when you consider the mode in which the bill was framed, which dealt with this contract; when you consider all these charges of fraud which were introduced into it, most unjustly I think. For Mr. O'Rorke was simply pursuing a path in making the bargain which he thought he

was entitled to pursue. It would no doubt have been better if he had exercised more discretion with reference to the position of the young man and with reference to the health of the father. At the same time it appears to me that there has not been a word established or proved in evidence of any misconduct on the part of Mr. O'Rorke with regard to the previous transactions, and I regret beyond all measure that one of the learned judges in the court below should have taken a different view, and should have made such observations upon the conduct and character of Mr. O'Rorke, that I can hardly see how it was possible for him (Mr. O'Rorke) to do that which I wish he had done, and which I think he ought to have done. It was scarcely possible for him, after such a bill had been filed, and after such a judgment had been delivered as was delivered in this case, to do otherwise than to fight it out to the utmost. It was impossible to do what I should much have wished to see done, namely, when it was made apparent to him, upon inquiry into the circumstances, that the father was in a state 832] *of hopeless ill health at the time when the transaction took place, and could only have been expected to live three months longer, he should have said at once,—Let all parties be remitted to their former positions,—with such demands as he might have thought it reasonable or necessary to make in respect of any costs which he had been put to in the transaction. It is quite deplorable that for an estate of this small amount, some £120 or £130, there should have been all the expense which must have incurred, and all the vexation and annoyance which must have been occasioned in the course of these proceedings, beginning with the decision of the Master of the Rolls in Ireland and going on to the Court of Appeal in Ireland, and now coming up to your Lordships' House. I should add that I do not think that there have been any laches on the part of the respondent in filing his bill, regard being had to the state of his poverty since the assignment was made.

My Lords, I believe the majority of your Lordships take a different view, but, having regard to the habitual protection afforded by the Court of Equity to the young and inexperienced, I cannot refuse to free the respondent from his improvident bargain. Had I the advantage of your Lordships' concurrence in my view I should still express, and I now do so with the more emphasis, my great regret that such a litigation as this should have been pursued, regard being had to the amount in question between the parties; and I farther regret that such charges should have been made

in the bill as necessitated resistance to the decree of the court below. My own view would be to move your Lordships to affirm the decree of the Court of Appeal in Ireland and to dismiss this appeal; but as I am aware that a different view is taken by the majority of your Lordships, of course that will not be the result of this hearing.

I ought also to mention to your Lordships that in this case my noble and learned friend Lord O'Hagan (who from the effect of a slight accident is unable to attend) has intimated to me that he concurs in the view taken by the majority of your Lordships.

LORD BLACKBURN: My Lords, I have come to a different conclusion from that of the noble and learned Lord who presided at the argument of this *case (Lord Hatherley), [833 as I must advise your Lordships to reverse the decree of the Court of Appeal in Ireland, and restore the judgment of the Master of the Rolls.

The material facts and evidence are fully and accurately stated by the noble and learned Lord, and I need not state them again. But I think it is not quite accurate to say that the Master of the Rolls in Ireland based his judgment, at least to any material extent, on the principle laid down by Lord Brougham in *King v. Hamlet* ('). The Master of the Rolls, referring to another case, says ('): "Under these circumstances I have come to the conclusion that the bill is not sustained. The law as to the sale of reversionary interests, as it stands since the statute, is thus stated by Lord Selborne in *Aylesford v. Morris* ('): 'The arbitrary rule of equity as to sales of reversions was an impediment to fair and reasonable, as well as to unconscionable bargains; both have been abolished by the Legislature, but the abolition of the usury laws leaves the nature of the bargain capable of being a note of fraud in the estimation of this court; and the act as to sales of reversions (31 Vict. c. 4) is carefully limited to purchases made *bona fide*, and without fraud or unfair dealing, and leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. Those changes of the law have in no degree altered the *onus probandi* in those cases which, in the language of Lord Hardwicke, raise,—from the circumstances or conditions of the parties contracting, weakness on one side, usury on the other, or extortion or advantage taken of that weakness,—a presumption of fraud. Fraud does not mean here deceit or circumvention; it means an unconscien-

(') 2 My. & K., 456; see 3 Cl. & F., 218. (') Printed papers in the case, 228.

(') Law Rep., 8 Ch. Ap., 490.

tious use of the power arising out of these circumstances and conditions, and when the relative position of the parties is such as *prima facie* to raise this presumption the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable.' I take that to be an accurate statement of the law as it stands at present. Fraud in this cause, in my opinion, there is none; nor is there unfair dealing, including in those words every dealing by which *one man having the means of getting a better bargain from another, effects the transaction by these means. Undervalue I see none in proof. Standing alone, mere undervalue is worth little. The evidence before me has satisfied me, that this transaction, which originated from the father as guardian of his son, under circumstances calling for a disposition of this charge, was a contract carried out at arm's length between this young man and his father on the one side, and Mr. O'Rorke on the other. There was no inducement held out, no advantage taken, and the son has got the full benefit of the contract."

I agree with the Master of the Rolls in thinking that the passage which he cites from the judgment in *Aylesford v. Morris* (') contains an accurate statement of the law as it stands at present. In each case it must depend upon the circumstances whether the presumption which Lord Hardwicke spoke of, is raised. Sometimes there may be a serious question whether it is or is not. But in the present case, which is the purchase of a reversionary interest, from a lad, only a very few days above twenty-one, in furtherance of an arrangement made whilst he was yet an infant, I think that the burthen was thrown on the appellant to prove that there was an absence of anything unconscientious on his part. I agree with the Master of the Rolls in thinking that the appellant has fully satisfied this *onus*.

I could not come to that conclusion if I thought that any material part of the eloquent denunciations of the appellant's conduct contained in the judgment of Lord Justice Christian was really based upon facts proved by evidence. The Lord Justice seems to have forgotten that it is of the essence of justice not to decide against any one on grounds which are not charged against him, and as to which he has not had an opportunity of offering explanations or calling evidence. I think it is only fair to Mr. O'Rorke to point out that those imputations of actual fraud are not made by

(') Law Rep., 8 Ch. Ap., 490.

the Lord Chancellor of Ireland, and are, I believe, in the opinion of every noble Lord who heard the argument, as well of myself, not justified.

But I think that the evidence does establish that in fact the father was at the time of this transaction in a state of health such *as to make the price given for this re- [835 version (which would have been a fair and even a liberal one if his had been a good life) an inadequate price as the facts were.

I agree with the noble and learned Lord who presided over the argument (Lord Hatherley) that there is not any evidence of the appellant's being aware of the state of the father's health. On the contrary, he dealt with the father, when purchasing of him portions of his annuity, as being a good life, and the father had boasted to him of his good health. This is strong to prove that the appellant *bona fide* believed the father's life to be good; and I see nothing to justify me in thinking that he did not reasonably believe this.

I think that if it had been known to the appellant that the father was in bad health this transaction could not have stood. And I think that the same consequences would follow if it could be shown that the appellant was only ignorant of it because he had neglected to make proper inquiries, or had neglected to take some steps which, according to the rules of equity, he ought to have taken.

My Lords, I will first inquire whether, supposing the father's life had been a good one, and he had died at the time when he did, from railway accident or any other cause not connected with his state of health, could this transaction have been impeached? The father was in a state of poverty, and it would have been wrong to become a party to any proceeding which would have put the price of his son's reversion into his hands; but the proposal made by the father and carried out, was that the proceeds should be paid into his son's own hands for his own use.

To test the matter, suppose that the lad had been told that he must consult a competent adviser, and that he had come to one of your Lordships for advice, and told you that neither he nor his father had any money; that he had this reversionary interest in £500 but was otherwise destitute; and that it was proposed to sell his reversionary interest in order to apply the proceeds for the purpose of educating him. What would your Lordship's advice have been? Would you have said, You must on no account do so; you must labor with your hands for your livelihood during your

father's life, in order that when your father dies you may 836] be an *uneducated man with £500 in your pocket? Such would not have been my advice. I should have told him that what was proposed by his father might turn out a blessing or a curse according to his own conduct, but that if he really would devote the period during which the proceeds would support him to study and acquiring knowledge of a profession, it was the best course for him. No doubt the lad would have sincerely enough declared his intention so to do. Had he then proceeded to ask if the terms offered by O'Rorke were fair, I should have said, They are more than you can hope to get from any one else, and, if your father's life is a good one, fair and even liberal, and I advise you to take them. I hope I should have been prudent enough to have added, But is your father's a good life; what is the state of his health? And I think the boy probably knew enough to have made an answer which would have led to the discovery that the life was not a good one.

I agree that if the appellant was bound to insist that the lad should consult an independent adviser before acting on his father's advice, the appellant can be no better off than if the lad had done so. And I agree that he ought to have required this if it was practicable. But it was the fact, and the appellant knew it to be the fact, that the boy had no friend whom he could consult but his father. No doubt he might have consulted a professional man, if he could pay him. But it was the fact, and the appellant knew it was the fact, that neither the boy nor his father had the means of paying a professional adviser. Was it then unconscientious in the appellant to agree to an arrangement, sanctioned by the lad's natural guardian, and which was for the lad's advantage, and which (after making for his own sake inquiries as to the father's life when he bought the annuity), he not only *bona fide*, but on reasonable grounds, thought was fair, and even liberal, on his part. Or do the rules of equity require that no such purchase can be made under such circumstances, except at the peril of the purchaser, if the price thought to be fair, and even liberal, should turn out, from a latent defect, to be inadequate? Before the late statute I think that was so; but I think it is so no longer, if the bargain be shown to have been made *bona fide*, and without fraud or unfair dealing, which in this case I think it is.

837] *It will be observed that I agree on the facts, and the inferences to be drawn from the facts, with the Master of the Rolls in Ireland, the Lord Chancellor of Ireland, and

the noble and learned Lord who presided at the argument (Lord Hatherley).

I agree with the Master of the Rolls in Ireland, and I differ from the Lord Chancellor of Ireland, and the noble and learned Lord who presided at the argument (Lord Hatherley), as to the application of the rules of equity to the particular case. And it is a curious instance of how different minds draw different inferences, that the facts that the lad was penniless, and except for his father, friendless, which lead the noble and learned Lord to the conclusion that the bargain cannot stand, are the facts which lead me to the conclusion that there was nothing unconscientious in the bargain, because they made it impracticable for the lad to have that farther advice, which I agree, if practicable, the purchaser should have insisted on his having.

I therefore come to the conclusion that the appeal should be allowed, and the judgment reversed with costs.

LORD GORDON: My Lords, I have had the advantage of perusing and considering the opinions which your Lordships have just delivered. I entertain great deference for the opinion expressed by Lord Hatherley, who has had occasion, in deciding cases of a somewhat similar character, to define the rules which are applicable to such cases. But every case must be determined upon the special circumstances which are substantiated by the evidence laid before the court; and I feel constrained in this case to adopt the view of the evidence which has been explained to your Lordships by my noble and learned friend (Lord Blackburn), and which was the foundation of the judgment of the Master of the Rolls in Ireland.

The sale of the right of reversion held by the respondent was evidently a prudent transaction with reference to the interest of a young man who was then about to commence the study of medicine, which would occupy about five years. The health of his father had probably not entered materially into the valuation of the reversion, because his father had obviously lived in a somewhat irregular course; and an occasional illness might therefore be *thought to be [838 only the natural result of excess, and not seriously to affect his life. The father, with all his faults and frailties, was the natural guardian of the son; and provision was made for the price of the reversion being paid by annual instalments to secure the son's support and education while prosecuting his studies. There was nothing, therefore, which could give the character of fraud, so far as the father was concerned, to the transaction.

The only point, which creates hesitation in my mind, is that the son had not the benefit of legal advice in the transaction. It was not, however, one involving any complication; and in the absence of any reason for suspecting fraud, I do not think that circumstance alone would justify the overturning of the whole transaction, which was carried out fairly, and secured to the respondent the sum which was fixed as the value of his right. Of course the want of legal advice in a case where there was reason for suspecting fraud would be a material element in the decision of such a case.

Even if I took a different view of the merits of the appeal I must express my regret that the respondent's bill of complaint contained so many charges of fraud which have been unsupported by evidence.

I concur in the motion which has been proposed by Lord Blackburn, that the judgment complained of should be reversed with costs.

Decree of Court of Appeal in Ireland reversed, with direction that the costs paid by the appellant to the respondent in respect of that decree be repaid to the appellant; and respondent directed to pay to the appellant the costs incurred by the appellant in the Court of Appeal in Ireland and in this House.

Lords' Journals, 30th July, 1877.

Solicitors for appellant: *Watney & Tilleard.*

Solicitors for respondent: *Bischoff, Bompas & Bischoff.*

Prospective demands, that is, claims to arise under existing contracts, may be assigned, though the work is yet to be done: *Field v. Mayor*, 6 N. Y., 179; *Bunteer v. Grugen*, 19 Grant's (U.C.) Chy., 167; *Kane v. Clough*, 36 Mich., 436; *Hawley v. Bristol*, 39 Conn., 26; *Augur v. New York*, etc., 39 Conn., 536; 1 Wait's Actions and Defences, 355 *et seq.*

A claim for extra compensation to be allowed a contractor for work already done is assignable: *Munsell v. Lewis*, 2 Den., 224; 1 Wait's Actions and Defences, 355 *et seq.*

A claim against a foreign government for an illegal capture is assignable: *Couch v. Delaplaine*, 2 N. Y., 397.

But a mere expectancy, a mere *jus precarium*, such as an anticipated donation from the government, is not assignable or capable of being sold. It is a mere possibility not coupled with

an interest: *Munsell v. Lewis*, 4 Hill, 635; 1 Wait's Actions and Defences, 355 *et seq.*; *Id.*, 361.

See *Kane v. Clough*, 36 Mich., 436.

A vested interest, in remainder, in personal property, though liable to be defeated by a future event, is assignable: *Lawrence v. Byard*, 7 Paige, 70.

A mere naked possibility or expectancy cannot be assigned at law, but a contingent right founded on an executed instrument, where the contingency does not depend on the existence at a particular time of a person now in existence can be released to the *terre tenant*, or person in possession by a rightful title; though *quere* whether it can be so released to a stranger: *D'Wolf v. Gardiner*, 9 Rhode Island, 145, 149, and cases cited; 1 Wait's Actions and Defences, 355 *et seq.*

See also *Sheridan v. House*, 4 Abb. Court Appeals Dec., 218, and cases

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cited in note; *Miller v. Emans*, 19 N. Y., 384; *Wilson v. Wilson*, 32 Barb., 328, 20 How. Pr., 41; *Larocque v. Clark*, 1 Redf. Surr. Rep., 471-2; *Jeffers v. Lampson*, 10 Ohio St. R., 102.

The right which an heir apparent possesses in the estate of his father, during the lifetime of the latter, is a bare possibility coupled with no interest, and is therefore not the subject of a *grant*: *Stover v. Eycleshimer*, 46 Barb., 84, 3 Keyes, 620, 4 Abb. App. Cas., 309; 1 Wait's Actions and Defences, 355 *et seq.*

Although no present or immediate estate or interest will vest in the grantee by virtue of an instrument purporting to convey the grantor's interest in his father's estate; executed during the father's life, yet if made *bona fide*, and for a valuable consideration, such instrument may be regarded as a *contract*, which a court of equity will protect and enforce after the father's death, as against the claims of the grantor's creditors: *Stover v. Eycleshimer*, 46 Barb., 84, 3 Keyes, 620, 4 Abb. Ct. App. Dec., 309; 1 Wait's Actions and Defences, 355 *et seq.*

Fitzgerald v. Vestal, 4 Sneed (Tenn.), 258; *Minns v. Davis*, 7 Texas, 26.

A testator directed his executor, by his will, to sell his real estate, and after having set aside a specified sum for the support of his widow, to divide the remainder of the proceeds of the sale among his eight children.

After the testator's death, and before the executor sold said real estate, S., a son of the testator, mortgaged his interest therein, to secure the payment of a loan of money. Held, that such mortgage operated as an equitable assignment to the mortgagee of the interest of S. in the proceeds of the sale of said real estate by the executor: *Horst v. Dagne et al.*, 7 Am. L. Rec., 536, Ohio Sup. Court.

The necessities of expectant heirs, sailors, etc., are usually so great, and they are so liable to be imposed upon, that they are especially subjects for the protection of a court of equity: see Story's Eq. Jur., Index, title "Heirs and Expectants;" 1 White & Tudor's Lead. Cas. in Eq. (4th Am. ed.), 773-836; Bisph. Eq. (2d ed.), §§ 820-1; Willard's Eq. (Potter's ed.), 178-183.

[2 Appeal Cases, 839.]

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[HOUSE OF LORDS.]

*ORR EWING *et al.*, Appellants; COLQUHOUN *et al.*, [839 Respondents.

River Navigation above Tide—Not a Public Right.

Per LORD HATHERLEY: There are two totally distinct and different things; the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way.

Per LORD BLACKBURN: The public who have acquired by user the right to navigate on an inland water have no right of property.

Per LORD GORDON: The right which the public have is a mere right to use the river for the purposes of navigation, similar to the right the public have to passage along a public road or footpath through a private estate.

Proprietor's Rights on both Sides.

Per LORD BLACKBURN: The owner of the banks of a non-navigable river may without any illegality build a mill-dam across the stream within his own property, and divert the water into a mill-lade without asking the leave of the proprietors *above* him, provided he does not obstruct the water from flowing as freely as it was wont; and without asking the leave of those proprietors *below* him if he takes care to restore the water to its natural course before it enters their land.

Per LORD GORDON: The right of a conterminous proprietor in the stream dividing his property from that of his opposite neighbor is very different from that with which your Lordships are now dealing.

Per LORD BLACKBURN : I think it clear law in England, that, except at the instance of a person (including the Crown) whose property is injured, or of the Crown in respect of an injury to a public right, there is no power to prevent a man making an erection on his own land, though covered with water, merely on a speculation that some change might occur that would render that piece of land, though not now part of the water way, at some future period available as part of it. I think that the land being covered by water is in such a case a mere accident, and that the defenders are as much at liberty to build on the bed of the river (if thereby they occasion no obstruction) as they would be to build on an island which might at some future period be swept away. I advise your Lordships to hold that there is no such power in Scotland.

THE action in this case was commenced in January, 1876, by the trustees of the late Sir James Colquhoun of Luss, Baronet, praying a judicial declaration that the river Leven in Dumbartonshire "is a navigable river, free and open to the public; and that a bridge over it, which the appellants were then erecting, would obstruct the navigation and the use of its banks and towing-path."

840] *The appellants, Messrs. Orr Ewing & Co., calico printers and Turkey red dyers, against whom the action was brought, are proprietors of land on both sides of the higher portion of the river Leven, where there is no ebb and flow. The bridge they were erecting was on their own territory, and they denied that it would obstruct the navigation.

On the 12th of June, 1876, the Lord Ordinary (¹) pronounced the following interlocutor:

Finds and declares that the river Leven, throughout its course from Loch Lomond until it falls into the river or Frith of Clyde at Dumbarton, is a navigable river, free and open to the public; and that the defenders have no right to execute any works which will in any way interfere with or obstruct the navigation thereof, or the free use of its banks and of the towing-path along the bank of the said river for the purposes of navigation, and decerns: Finds and declares that the piers recently erected by the defenders in the bed of the said river near to the east bank are an obstruction to the free navigation thereof: Therefore decerns and ordains the defenders forthwith to remove the said piers.

Against this interlocutor Messrs. Orr Ewing & Co. reclaimed to the Inner House (First Division), who, concurring with the Lord Ordinary, on the 26th of January, 1877, refused the reclaiming note (²).

Messrs. Orr Ewing & Co. thereupon appealed to the House of Lords, having for their counsel Mr. *Cotton*, Q.C., and Mr. *Davey*, Q.C. The Lord Advocate and Mr. *John Pearson*, Q.C., appeared for the respondents.

The argument on both sides involved a long and minute detail of facts and of evidence. All the circumstances are elucidated in the following opinions of the Law Peers. And the authorities cited and bearing on the case are fully examined and commented upon.

(¹) Lord Rutherford Clark.

(²) Scotch Cases, 4th Series, vol. iv, p. 344.

LORD HATHERLEY: My Lords, this case is one in which the pursuers complain of the defenders in respect of their having erected a bridge across the river Leven, at a part of that river where they (the defenders) are proprietors on both sides. The pursuers are the trustees of Sir James Colquhoun. The defenders are gentlemen occupying a large manufactory and other works on one side of the river, and they are the proprietors of the land on both sides of the river. *Before erecting this bridge they entered into [84] communication with divers persons who might be supposed to be interested in the matter, and, amongst others, with those concerned in the navigation of the stream. They entered also into correspondence with the author of the present pursuers in respect of title, and from him they obtained a letter which has been a great deal referred to in the cause, but upon which I think the case will not be found to turn. He said in that letter that provided no injury were done to his fishings and other rights, he had no objection to the course they were about to take in erecting the bridge. The bridge was to be erected for the purpose of carrying a railroad over it, and the piers of the bridge were placed in the *alveus* of the river; and it is, or it was at first, alleged that they were so placed as to injure the rights of the pursuers as to fishings, and their rights also in respect of the navigation of the river. The defenders were said also to injure by these works the towing-path of the river, and in that sense also to injure the navigation. I think we may dismiss from our consideration that part of the case which referred to damage done to the fishing.

The Lord President, who first gave his judgment in the Court of Session, says:

The only question is whether the piers of the bridge complained of interfere with the navigation of the river, and upon that ground ought to be removed.

And that, my Lords, is the point which, as it appears to me, it is now necessary for us to consider. The Lord Ordinary and three out of four of the learned judges who sat in the Court of Session, when they inquired into this matter, were of opinion that injury was either done actually to the navigation of the river, or that such interference had taken place with the *alveus* of the river as that danger might possibly arise to the navigation of the river from the works which had been carried into effect. That is a question, as your Lordships will perceive, entirely of fact, and it will only be as such that we can treat it. Lord Mure was of opinion that that matter of fact was established in favor of the defenders and not against them. When I say "estab-

lished in favor of the defenders," I apprehend that one may take it to be correct as a point of law with reference to these works, that the duty is cast upon the defenders of 842] showing that when they have *placed these works in the *alveus* they will not obstruct that right which is exercised by the public. At all events, I will assume that that burthen is thrown upon them, and will consider how far they have or have not discharged it.

My Lords, the river Leven appears to be a river upon which there is undoubtedly navigation, but not to any very great amount, in the course of the year. The navigation appears to be carried on in what are called scows, large barges, I suppose we should call them, the largest being of about fifteen feet beam, and the length being some fifty or sixty feet. This navigation has been going on for many years, and two of the witnesses called on behalf of the defenders are persons who have been up and down with every scow or barge which has made the voyage past the place in question since the bridge was erected. The position of the bridge in the river is this: There are upon the river Leven several mills, and arrangements are made at those mills by means of what is called a mill-lade or mill-run for taking the water off from the river to the works which may require its assistance. That diversion is effected by means of a lade; and the water is guided into its course out of the river and down the lade by means of a weir which is erected for that purpose, of a solid construction sloping up into the river, and having what the witnesses called a batter or a slope down from its top into the *alveus* of the river. That is the mode in which these mill-lades are framed. One of these exists some forty or fifty feet below the bridge, so that anything passing through the bridge would within that short distance find itself abreast of, unless it went into, the mill-lade.

My Lords, that being so, we have further to consider what the navigable channel of the river is; and I think upon that it is established beyond a doubt that except in extraordinary circumstances, such as possibly I may have afterwards to refer to in connection with one piece of evidence, the navigable channel of the river is from a distance of twenty-five feet, as one of the witnesses for the pursuers, Mr. Copland, the engineer, said, to the west of the easternmost pier, which is the particular pier complained of in the progress of this case as interfering with the navigation. Other witnesses, the witnesses for the defenders, said that they put it at a rather greater distance than that; some

said *twenty-seven, others as much as thirty feet [843 distant from the west pier. It is somewhere about that distance. As regards the depth it is said to be, even when it is not at its highest flow, some sixteen feet in that portion of the river I have referred to, which is a depth far greater than that occupied by any scow navigating the river.

It appears, on the other side, on the eastern side of the pier, which is the side where the lade is to be found, that, owing to some effect I suppose of scour, which may have been produced from the particular arrangements of the lade, or from whatever reason, there is in fact a hole. I can call it nothing else. Some of the witnesses for the pursuers have spoken of that hole as being a portion of the river which they considered anterior to these works a navigable portion of the river. But my Lords, on the other hand, I think it will be found that the evidence largely preponderates to show that barges were never in the habit of taking any other course than the course down the western side of the pier and in the deepest channel of the river; and that so far were they from taking any other course, especially towards the east of the pier, that the witnesses tell us that it was considered dangerous to pass by on that side, because if you passed at all near to that portion of the river which would be to the east of the pier, or which the pier itself occupies, you would run a great risk of being carried into the lade, a result which of course would be deprecated by those who were skilled in navigating the river.

My Lords, I shall now briefly refer to the evidence which makes out these points, before considering what would be the effect of the law applicable to the state of facts which I consider to be established by the evidence.

I consider the burden of proof to be thrown upon the defenders; and I therefore look to their evidence to see how they have attempted to establish that proof. We first find a witness of considerable importance, one who I think is evidently quite impartial in the whole matter, Mr. Alexander Neilson. He describes himself as "Captain of the steamship Chancellor, belonging to the Loch Lomond and Loch Long Steamboat Company." He says:

I run the Chancellor on Loch Long four and a half months of the year, and I remain in the service of the company during the winter time in connection with *other work. I have been twelve years in the service of the company. I [844 have been in charge of all the steamers that have been taken down the Leven during the last 16 years. Before that, I owned gabbarts⁽¹⁾ on the Leven for about 20 years.

He is a man of very large experience, and he appears to me to be a very impartial witness. He goes on to say:

(1) Scows.

I took them up and down very often, and am well acquainted with the navigation of the river. The greatest current I ever saw in the Leven was about six miles an hour. There are a great many catch-waters

—That is what is termed in our southern phrase weirs, the weirs or catch-waters are used to divert the water to the lades, and erections in the water at the various works along the banks. There are eight separate works down the river, and they all have catch-waters into the middle of the river, and some of them pipes to take off the water. The Leven is navigable on an average for about four months in the year. In September, 1875, I examined the new bridge at Dillichip ⁽¹⁾ on behalf of the steamboat company, and reported my opinion upon it to the directors. I inspected it two or three times while it was being erected. I measured the bridge, and saw the height of the pillars. So far as they were concerned, I saw nothing to interrupt the navigation except that they were two feet too low. I thought that they should be raised to that extent, and reported so to the company. The bridge has since been heightened in conformity with that opinion. I consider that the navigation of the Leven at Dillichip is now as free as ever it was. I think there will be no more risk incurred than was incurred formerly in taking steamboats and scows down the Leven whatever be the state of the water. The deepest part of the channel [that I have spoken of] at the bridge where we used to take boats down was about twenty-seven or thirty feet west of the eastmost pillars.

Now, my Lords, I think I am justified in saying that as far as this evidence goes upon the matter of fact, it appears to me to be established plainly and distinctly that there is no interference with the right of navigation on this river.

The claim made by the pursuers is to have an interdict, that is what in fact it amounts to, or a declaration of their rights. First, they seek by their action to have it declared that the river Leven is “a navigable river free and open to the public,” which it appears to me to be clearly made out that it is. It is open to public navigation in the sense of being open to free navigation on the part of those persons who may require the use of it. Then they seek further to have it declared that the erection of this bridge is an interference with that right. They seek further declarations [845] *with reference to their salmon fishings which I have passed over, because that point was abandoned at your Lordships’ bar, and certainly does not seem to have been argued in the court below. They seek also to have some declaration as to the towing-path, which seems likewise a point not insisted on for serious argument. But the point which has weighed most with the learned judges in the court below, and which of course your Lordships would feel to be one which would require very great consideration, having regard to the very high authority of those learned judges who have considered the case, is, whether or not the pursuers are entitled to a declaration with reference to the possible damage which may be done to the navigation of the river.

(1) The bridge in question.

That which appears to have weighed most with the learned judges in the Court of Session was the case of *Bickett v. Morris* (¹), decided in your Lordships' House with reference to obstacles placed in the *alveus* of the river at Kilmarnock. That case itself was of a totally different character from the case raised here. That was a case of a proprietor on one side of the river having his rights interfered with by the proprietor on the other side making such an erection in the *alveus* of the river as to effect an alteration of the current of the stream with reference to his own land upon the other side. My Lords, I apprehend that the law applicable to that case would be beyond all possibility of doubt, neither should I have felt much hesitation anterior to that decision in coming to the conclusion that although each of the two proprietors on the banks of a river is said to have rights up to the *medium filum fluminis*, neither of those persons may so use those rights with reference to the river which has been accustomed for all time to run in a certain course as to alter the course of that river with reference to the property of his neighbor who is separated from him only by the river, and whose property on the other side of the river is affected by that change.

The learned judges of the Court of Session seem to me to have applied the case of *Bickett v. Morris* in a manner in which the circumstances and the grievance complained of in this case would not permit it to be applied. They say, and it appears to me justly, that the right of navigation is a right to be protected like any other right, and you [846 are not entitled to interfere with that navigation, because what you are now doing may be said not to interfere with any existing mode of navigation or with any existing mode of exercising that right. Now it appears to me that there are two totally distinct and different things; the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way, and with that right of way you must not interfere in any manner by any course you take. The question seems to be simply this: Does this bridge interfere with that right of navigation as exercised, or as capable of being exercised, in the stream? A man having a right of way over my field cannot say that I shall not have the power to put swing gates across his path so as to inconvenience him in walking along it. I cannot put gates to shut up the path in such a way as would interfere with his exercising his right, but if I do not interfere with that, it cannot be said that I shall not put up

(¹) Law Rep., 1 H. L. Sc., 47.

gates. This point is dealt with in the opinion of one of your Lordships, which I have had the pleasure of seeing, and therefore I need not dwell upon it. I think we have evidence here which is beyond all dispute, evidence of people who speak with regard to the last half century with a perfect knowledge of the river, and they say that the right of navigation has not been exercised to the east of the piers of the bridge. In my opinion the case in your Lordships' House, which has weighed very much with the learned judges in coming to the conclusion to which they have come, has no application to this case.

Having come to the conclusion that no injury has been established of which these pursuers have a right to complain, and having had the advantage of the assistance of one of your Lordships in considering the form in which the resolution of this House should be worded, it appears to me that we should do well to find that the river Leven is a navigable river, free and open to the public; that the appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along the banks of the river for the purpose of navigation; that the works complained of in the summons do not, in point of fact, interfere with or obstruct the navigation of the river; and with these findings to remit 847] the case back to *the Court of Session, with instructions *quoad ultra* to assoilzie the appellants from the conclusions of the summons, and to find them entitled to the expenses incurred by them in the Court of Session.

LORD BLACKBURN ('): My Lords, in this case the Lord Ordinary ('), by his interlocutor, found that "the river Leven is a navigable river, free and open to the public, and that the defenders have no right to execute any works which will in any way interfere with or obstruct the navigation thereof, or the free use of its banks and of the towing-path along the banks of the said river for the purpose of navigation," and "that the piers recently erected by the defenders in the bed of the said river near to the east bank are an obstruction to the free navigation thereof, therefore decerns and ordains the defenders forthwith to remove the said piers." On appeal to the First Division, the Lords, by a majority, adhered to the interlocutor.

The pursuers, now respondents, had in their summons and condescendence set up a case that there was an obstruction to the towing-path, and also that as proprietors of

(') Revised by his Lordship in print for the report.

(') Lord Rutherford Clark.

land on the banks of Loch Lomond, and as owners of the salmon fishery in the Leven, they sustained a damage, and had a cause of action special to themselves, beyond what any other of the public had. This was negatived by the Lord Ordinary, and no appeal having been brought by the pursuers, now respondents, it is, I apprehend, not competent to your Lordships to inquire whether this was right or not. The only appeal is by the defenders from the interlocutors pronounced against them.

The river Leven is an inland stream, and the tide does not flow up to the spot where the piers are erected. And, as is pointed out by the Lord President, the rights of the Crown, as regards the soil of the *alveus*, and of the public to navigate, are not the same in such a river as they are in the sea or in a tidal estuary.

In the present case, however, there is ample evidence that there had been, at least as long as living memory extended, a user by the public of the navigation in the river, during the period of the *year when the water was high [848 enough; that is according to Mr. Smollett, who was called for the defence, on an average for two-thirds of the year. And the very able counsel who argued for the appellants felt it so impossible to deny that there was evidence of user in this water-way by vessels, such that similar evidence if the question had been as to the user of a land-way by carriages would have established the public right, that he abandoned this point, and I do not think any of the noble and learned Lords who heard the argument entertain any doubt that the interlocutor, so far as it finds that the Leven is a navigable river free to the public, and that the defenders have no right to execute works which obstruct the navigation, is right.

But the contest was as to the finding of the Lord Ordinary, that the piers recently erected by the defenders in the bed of the river near to the east bank are an obstruction to the free navigation of the river, and the conclusion that the defenders should be ordained to remove them. I have come to the conclusion that I ought to advise your Lordships to reverse the finding in the interlocutors on this.

The nature of the inquiry requires the consideration of two questions, each of mixed law and fact. First, What, just before the piers were erected, was the extent and nature of the public right, and over what space it extended? and when that is ascertained; second, Whether the piers are such and so situated as to be what in point of law is an obstruction?

I think that the facts are to a certain extent perfectly clear. The place in question is considerably above the highest spot to which the tide ever flows. There is there a curve of the river towards the east or left side of the river, so that the chord of the arc which the river forms is on the west side. The towing-path is, and has always, as long back as living memory goes, and certainly for more than sixty years, been on the west or right side. On the east side from some remote period before living memory, and certainly for at least sixty years, an artificial cut or lade to lead off water to the Dillichip works (now occupied by the defenders), and a catch-water projecting up the river so as to divert the water into the lade have existed. This catch-water is between 300 and 400 feet in length.

849] *The present condition of the catch-water is described by a witness called for the defenders, James Deas, in the following terms:

That plan was made under my directions. It is an enlarged plan and sections of the river at and near Dillichip Bridge. The catch-water wall is from 8 to 10 feet broad at the base. It is a rough stone bank, with timber on the inside, and roughly pitched with stones on the outside. It is perpendicular in the inside, and slopes out with a batter to the outside. The water was a little under it the last time I saw it. On the first occasion it was covered. All that was visible was a little broken water on the top.

Cross.—I did not measure the perpendicular height of the intake wall, but it would be from 6 to 8 feet.

The pursuer's witness, Allan Stewart, on cross-examination, referring to a cross-section made under his directions, says:

On cross-section 17, under the bridge, the deepest part of that is right in front of the lade. If a boat went down there before the bridge was built, I think it would be in very great danger of striking the catch-water wall. Q. Therefore that was not a part of the channel that could be used for navigation?—A. Certainly not exactly at the side of the bridge. It is hard to say how far the pitching of the catch-water wall is carried to the west, as there is very little of it visible, and I have no doubt that for safety it is carried under ground for some distance. I should think the slope of the pitching would come out 2 or 3 feet towards the middle of the river. Q. Would that bring the edge of the pitching just about the westmost side of the east pier?—A. It takes 7 feet to bring the post at the catch-water to the westmost side of the pier. The post is on the east face of the wall. On the same cross-section the deepest part, under the main span of the bridge, is 50 feet from the west, and 40 feet from the east pier, and the depth is 2 feet 9 inches.

The cross-sections made by the surveyors on each side were all in process, but it has not been thought worth while to print them. They were, however, produced at your Lordships' bar, and they correspond as to everything, except the extent to which the sloping side or bottom of the catch-water extends to the west.

The piers, it is clear, are in water as deep as any part of

the channel, and the western side of the lowest of the two piers is about 41 feet from the solid bank as it now is, and about 6 or 7 feet further out than the post which marks the end of the inner wall of the catch-water, and consequently, if the sloping part extends so as to render the navigation impracticable for a distance of 10 feet, the pier is 3 feet to the east side of the impediment, if the sloping part so extends less than 7 feet, the pier projects on the west side of the impediment. All are agreed that the piers *are [850 about 30 feet higher up the river than the end of the catch-water where a post stands. Lord Shand says :

The fact is that the east piers of the bridge have been put down in a part of this river which is deep enough for navigation purposes at many states of the river, and there can be no doubt that the piers would be an obstruction, and clearly a material and present injury to the navigation of the river, but for the circumstance of the existence of the catch-water, to which reference has already been made. The piers are about 5 feet in diameter, and are solid blocks of masonry, from 36 to 41 feet from the east bank; and there is no doubt they are in a depth of water that could be used for navigation. But then it is said, that though they would be an obstruction to a great part of the water-way if there was no catch-water there, they are not so in point of fact, because you must take the river as it has existed from time immemorial, and that is, I think, a reasonable contention on the part of the defenders.

I do not think it possible to state the point as to which the difficulty arises more clearly than is here done.

If the piers had been placed 20 feet further west than they are, it would have been too obvious to admit of argument that they must have been in point of fact and at the present time an obstruction to the navigation. If they had been placed 20 feet further east, so as, though in the bed of the river, to be quite inside the catch-water, it would, I think, be clear that they would not in fact have been at the present time an obstruction to the navigation, as it has been used as long as memory goes; but the question of law would have arisen whether they were illegal because placed in the *alveus* of the river, where if (by any possible, though improbable, change the catch-water was removed) the space might be useful for navigation. As it is, there is a disputed question of fact, which has to be determined on the evidence, viz., whether the navigation was *de facto* so used and enjoyed that the piers placed where they are occasion at the present time an obstruction to that navigation.

My Lords, there has been evidence given which renders this a question on which different minds may well come to different conclusions. And, in fact, the Lords of Session have come to different conclusions upon it. The Lord Ordinary did not apparently come to the conclusion of fact which he did without hesitation. He says :

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On Ewing v. Colquhoun.

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But the defenders maintain that the piers do not obstruct the navigation. On this question the evidence is very contradictory. On the whole the Lord Ordinary 851] prefers that of the pursuers. The witnesses for the defenders give a very unintelligible account of the manner in which they have been accustomed to conduct their boats between the piers and the right bank of the river. One thing, besides, is very evident, that in descending the river a boat will have less space and time to clear the bridge than to clear the obstruction presented by the defenders' catch-water dyke.

The Lord President says:

The Lord Ordinary's findings, I think, are quite satisfactory, in so far as he finds that this river is a navigable river free and open to the public, and that the defenders have no right to execute any works which would in any way interfere with or obstruct the navigation or free use of its banks, and of the towing-path along the bank of the said river for the purposes of navigation; and I need only say, with reference to that last finding, that I should have been inclined to make it a little more extensive than his Lordship has done, because it seems to imply that in order to entitle the public to complain they must be in a position to show that the operations of which they complain do in point of fact, and at the present time, interfere with or obstruct the navigation. I do not think the burden upon the pursuers in an action of this kind is so heavy as his Lordship supposes. On the contrary, it rather appears to me that if any man building a bridge over such a river as this fixes his piers *in alveo* of the river, he is in point of fact committing what is an illegality in itself. He has no right to build in the *alveus* of the river. No man is entitled to build even in the *alveus* of a small stream, at least without the consent of all the other proprietors who are interested in that stream, and I think, *multo magis*, no man is entitled to build anything in the *alveus* of a stream in which the public have rights of navigation. In short, I am inclined to be of opinion that the doctrine which was applied in the case of *Bickell v. Morris* (*) is quite as applicable to a river of the description we are now dealing with as it was to a private stream. The principle of that case appears to be, that where there are other parties besides the party complained of who have an interest in a running water, it is illegal to build *in alveo*. It is not enough to say in defence of the operation complained of that it does nobody any harm. It may be that at the present moment the injury may not be foreseen, and yet it may occur, because nothing is so wilful and capricious (if we may use the expression) as a stream of running water, and it is almost impossible to foresee what the effect may be of any interference with the natural flow of such a stream as regards the proprietors further down the stream, or as regards the proprietor opposite to the place where the operation is carried out. Now, in like manner, in the case of a navigable river like this, where there is no great abundance of water, and where the deep part of the channel is but narrow, and there is nothing to spare in the way of room for navigation, it is very difficult to foresee what the effect of any operation of this kind may be in times of flood, or in various states of the river. The deep water channel of a stream like this may shift and vary by the operation of causes with which we are very imperfectly acquainted, and which even experts of the highest skill are unable to foresee. And, therefore, to put down the pier of a bridge 852] or any other building in the **alveus* of a river of this kind appears to me to be what I should call a dangerous operation as regards the navigation, even though it cannot be shown that at the present moment it constitutes an absolute obstruction to that navigation.

I have made these observations because I have some little difficulty in saying that upon the evidence before us the preponderance or weight of the evidence is in favor of the pursuers upon the question of fact whether the piers of this bridge do at the present moment constitute an obstruction to the navigation. It is a narrow case in that respect, and if the pursuers were under the burden of proving as matter of fact that at the present moment there is an obstruction to the navigation caused by the existence of those piers, I should hesitate to affirm that proposition.

(*) Law Rep., 1 H. L., Sc., 47.

So that it appears that the Lord President would not have found the fact against the now appellants if he had not taken a view of the law, which, if correct, rendered it immaterial.

Lord Deas says :

The Crown holds the *solum* of the tidal part of the river as trustee for the whole public, but in the remaining portion of the river the proprietors of the banks are the proprietors of the *solum* of the river, and the right of navigation on the part of others requires use to found and support it. In the present case, therefore, I think it incumbent on the pursuers to make out that the works objected to do or *may* cause obstruction to the kind of navigation which has been prescriptively practised by members of the public; but, on the whole, I think that the proof sufficiently preponderates in that direction. I do not intend to go into the details of the proof. In some respects it is contradictory, but upon the whole I think the burden of the proof is in favor of there being a certain degree of obstruction at present; and I think it is at all events impossible to say that there is no ground for apprehending obstruction in future. Either of these reasons is quite sufficient to entitle any member of the public, interested in the navigation, to object to such an erection as we have here, and consequently to justify the conclusion at which the Lord Ordinary has arrived.

So that he hesitatingly finds that there is a present obstruction, but, agreeing with the Lord President that it is enough if it is impossible to say that there is no ground for apprehending obstruction in future, bases his judgment more on that latter ground.

Lord Mure finds the fact for the defenders.

Lord Shand finds, with some hesitation, that it is proved that in fact there is an obstruction, but with more positiveness bases his judgment on taking the same view of the case as is taken by the Lord President.

My Lords, before proceeding to consider what the fact is, I think it expedient to consider whether the law really is as the *Lord President and Lord Shand, and to a lesser [853 degree Lord Deas, seems to have thought it was. I have very great respect indeed for the learning and logical acumen of those learned judges, and I should not differ from them without much consideration. But I have come to the conclusion that they have taken a mistaken view of the principle on which the case of *Bickett v. Morris* (') in your Lordships' House, and those Scotch cases which are there affirmed, were decided, or at least have applied it to a case to which what I think the true principle does not apply; I think and submit to your Lordships that the principle on which they were really decided was that where any unauthorized erection is a sensible injury to the proprietary rights of an individual, there is *injuria*, for which he might in a court of law in England, recover at least nominal damages. A court of equity in England, or the Court of Session in Scot-

(') Law Rep., 1 H. L. Sc., 47.

land, in the exercise of its equitable jurisdiction, would not order the removal of the erection if convinced that the damage was only nominal, but where there is an injury to the proprietary rights in running streams, the present injury now producing no damage may hereafter produce much. And I understand the principle of *Bickett v. Morris* (') to be that where an erection is a present sensible *injuria* to the proprietary right of the owner of the other part of the *alveus*, or of the opposite bank of a running stream, he may have it removed on the ground that there is a present injury to the right of property, if it is impossible to predicate that it may not produce serious damage in future, though the complaining party is not yet in a position to qualify present damage. And I think the same principle will apply where the complaining party is not a proprietor, *ex adverso*, of the spot where the erection is made, but is a proprietor of land on the banks of the stream below the spot, but so near to it that the erection *in alveo* alters the natural flow of the water on the complaining parties' land. But I do not think it was intended to be decided, and I do not think it is the law, that an erection *in alveo* of a natural stream is illegal *per se*, if all who have property on the banks of the stream consent to the erection. Nor do I think it was meant to be decided, nor do I think it law, that a riparian proprietor on the water of Kilmarnock or on the water of 854] Irvine, into which it flows, 10 miles below the town, on whose land the flow of the water would be in no way affected, could have maintained the action against Bickett for altering the line of his building in the town on the water side, which Morris, the proprietor of the houses and building ground immediately opposite, did maintain; for I think that there would be no injury to the proprietary right of the party complaining in respect of such land, no *injuria* to him.

Now the public who have acquired by user a right of way on land, or a right of navigation on an inland water, have no right of property. They have a right to pass as fully and freely, and as safely as they have been wont to do, but unless there is a present interference with that right, or it can be shown that what is now done will necessarily produce effects which will interfere with that right, there is no *injuria*, and I think that if there be no *injuria*, the foundation of the right to have the thing removed, fails.

My Lords, as the *ratio decidendi* of this House in *Bickett v. Morris* (') is unquestionably binding, I shall proceed to

(') Law Rep., 1 H. L. Sc., 47.

support my view of that decision by argument and authority, and I think it the more necessary to do so, as the Lord President, who as Lord Justice Clerk was a party to that decision, seems now to take a different view of the effect of that decision from that which I take.

My Lords, where the property in the banks of a natural stream, above the flow of the tide, is in different persons, *prima facie*, and until the contrary is shown, the boundary between their properties is the *medium flum aquæ*. In this respect there is no difference between the law of England and Scotland. And, after some diversity of opinions, it has, I think, been for many years the settled law of England, that the proprietor of land on the bank of such a river has, as incident to his property in the land, a proprietary right to have the stream flow in its natural state, neither increased nor diminished, and this quite independently of whether he has as yet made use of it, or, as it used to be called, appropriated the water. This can hardly be considered as settled law in England before the case of *Mason v. Hill* (*), in 1833. It had been the law in Scotland from a [1855 much earlier period. In *Bannatyne v. Cranston* (*):

It was not found necessary to the pursuer to libel or qualify any use of the burn and water thereof wherein he was prejudiced by the defenders taking in the same, seeing the Lords found that the water running by his land which lay marching contiguous to one side thereof, could not be drawn from any part of the land marching thereto without his own consent. For albeit, he had no present use thereof, yet he might possibly find thereafter some use for the same.

This was in the year 1625. Precisely the same law has been now established in America, *Blanchard v. Miller* (*), and in England, *Mason v. Hill* (*), without, I think, either the American or English judges being aware that the Scotch judges had so long before anticipated their reasoning. This right is subject to the use of the water by those above him, below him, and opposite to him, either acquired by user, or such as the general law gives to the riparian proprietors. I refer to the very elaborate judgment of the Court of Exchequer delivered by Baron Parke (in 1851), in the case of *Embery v. Owen* (*), as containing an exposition of the English law.

In *Miner v. Gilmour* (*) (in 1858), Lord Kingsdown, in delivering the judgment of the Privy Council, says:

It did not appear that for the purpose of this case any material distinction exists between the French and the English law. By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary

(1) 5 B. & Ad., 1.

(4) 6 Ex. 367.

(2) Mor. Dict., 12,769, "Property."

(5) 12 Moore, P. C., 156.

(3) 8 Greenleaf, Amer. Rep., 268.

use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it, or what may be deemed the extraordinary use of it, *provided that he does not thereby interfere with the rights of other proprietors either above or below him.* Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.

My Lords, I do not know if the Lord President, in the passage I have already read, means to state that the law of Scotland is that an erection *in alveo* of a running stream, 856] though in a man's *own land, is *prima facie* illegal, even if it does not alter the flow of the water on any one else's land, nor interfere with the rights of other proprietors either above or below him, nor with the public right of navigation in another part of the stream. But I think that it was necessary to go as far as this in order to support his conclusion. If such be the law of Scotland it is different from what Lord Kingsdown, in the passage quoted, states to be the law of England and France.

I have already read what the Lord President says on this subject, and I cannot agree to it.

The owner of the banks of a non-navigable river has an interest in having the water above him flow down to him, and in having the water below him flow away from him as it has been wont to do: yet I apprehend that a proprietor may without any illegality build a mill-dam across the stream within his own property and divert the water into a mill-lade without asking leave of the proprietors above him, provided he builds it at a place so much below the lands of those proprietors as not to obstruct the water from flowing away as freely as it was wont; and without asking the leave of the proprietors below him if he takes care to restore the water to its natural course before it enters their land. It would require strong authorities to lead me to believe that the law of Scotland does give the proprietors on the banks of the stream a right to act the part of the dog in the manger to such an extent as to hinder this. None were cited at the bar, and I find that in the *Magistrates of Linlithgow v. Elphinstone* (') it is laid down that,

A man who builds a mill is entitled to make an aqueduct, provided, after using the water for his mill, he restores it to the river from whence it was taken. This right he has from the law of nature without the aid of prescription.

The Lord Advocate admitted that he understood the law of Scotland to be that if the same person is proprietor of the

(') Kame's Dec., 332.

ground on both sides of a river, in which there is no right of navigation, he can change its channel as he pleases, provided he restores it to its old channel before it leaves his ground. That is, of course, subject to this qualification, that it flows out of his ground into the lands below as it was wont to flow, neither increased nor diminished in quantity or quality or direction.

*There have been several Scotch cases in which a [857 proprietor on one side of a river had been held entitled to have a new erection *in alveo* removed, but in every one of them the person complaining of the erection was one who owned land against which the new erection directed a flow of water greater than had been wont to flow on it before. In *Menzies v. Lord Breadalbane* (¹), Lord Eldon seems to me to point out with great clearness that it was against such a proprietor who is prejudiced, and as I think against such a proprietor alone, that the erection was unlawful. He first points out that it was clear in fact that if the embankment should be continued as it was projected, "it will have the effect of throwing the ordinary flood streams of the river off the lands of Lord Breadalbane and on the lands of Sir Neil Menzies," and then says (²):

Now with reference to the law of Scotland this is perfectly clear, that a superior heritor cannot direct (query, divert?) any part of a stream to the *prejudice* of an inferior heritor. It is also clear that an inferior heritor cannot do that which shall cause the water to stagnate to the *prejudice* of the superior; that is acknowledged to be clear law. But it is said, that applies only to the *alveus* of the course. But it does not appear to me that there is any solid ground for this distinction. The ordinary course of the river is that which it takes at ordinary times; there is also a flood channel. I am not talking of that which it takes in extraordinary or accidental floods; but the ordinary course of the river in the different seasons of the year must, I apprehend, be subject to the same principle.

He concludes that Lord Breadalbane in this case ought not to be allowed to carry on this work in what (if I may be allowed to coin a word to express Lord Eldon's idea) was the flood *alveus* of the river to the prejudice of Sir Neil Menzies, but that the interdict as craved was too extensive, and he would prepare a judgment with the proper qualification. That deliberately prepared judgment is as follows:

That the respondent ought to be prohibited and interdicted from the further erection of any bulwarks, or any other *opus manufactum*, upon the banks of the Tay, which may have the effect of diverting the stream of the river in times of flood from its accustomed course, and throwing the same upon the lands of the appellants.

I cannot think that Lord Eldon would have given a similar judgment against works of Lord Breadalbane, in the accustomed *course, either in times of flood, or in [858

(¹) 3 Wilson & Shaw, 235.

(²) 3 Wilson & Shaw, p. 248.

summer, in favor of a proprietor whose lands lay on the Tay below Dunkeld, and on whose lands the diverted waters could not be thrown.

It remains to see if there is anything in the judgment in *Bickett v. Morris* ⁽¹⁾, and above all in the opinions of the noble and learned Lords who advised your Lordships House on that occasion, inconsistent with this view of the law. I think there is not.

There certainly was nothing in the facts of that case to call for a judgment inconsistent with it. The pursuer and defender were proprietors of the opposite sides of the Kilmarnock water where it flows through the town of Kilmarnock, where the land is building land, and every foot is or may be of value. The defender had built, and after warning persisted in building, his wall into the course of the stream, and thereby necessarily diverted the water and threw it on the pursuer's land. The point made was, that this could not be held to the prejudice of the pursuer, unless he could show that damage had actually been occasioned. As to this, the Lord Justice Clerk (now the Lord President), says ⁽²⁾:

I entertain no doubt that a party in the position of the defender here is not entitled to make any erection *in alveo*; but then, at the same time, if it could be shown that the party complaining of a very slight encroachment upon the *alveus* was doing so for the mere purpose of annoyance—in *emulationem vicini*—not under any apprehension of danger to himself or of damage to his property, but merely for the purpose of asserting his legal right up to a definite line, if it could be shown that the work had been accidentally extended into the *alveus*, I am not prepared to hold that such a work would be illegal.

My Lords, I pause here to observe, that on the view of the facts in the present case which I take, and which I understand the Lord President also to take, this is an apt enough description of the present case. He then goes on:

But, then, the question comes to be whether the pursuer in this case, though he cannot (and that is the fair result of the proof) show that any damage has actually been occasioned by the erection of this wall, is not in a position to say that an injury has been done to him because the operation involves a certain risk of damage. . . . There is nothing the operation and action of which is more uncertain than running water. . . . I think, therefore, looking to the nature of the subject, and to the fact that this is not an encroachment of an inch or two, or any such impalpable encroachment as that, but that it is an encroachment clearly established to be of considerable size, and certainly calculated to effect some deviation in the course of the water, that the opposite proprietor, the pursuer, is well entitled to say, "I apprehend risk to my interest, I apprehend that my property may be affected by the consequence of this diversion of the stream."

And the interlocutor appealed against was as follows:—Find that the erection complained of by the pursuer is an erection in the *alveus* of the waters of Kilmarnock *ex adverso*

⁽¹⁾ Law Rep., 1 H. L. Sc., 47.

⁽²⁾ 2 Court of Sess. Cas. (3d Series), 1089.

of the pursuer's property, and has the effect of diverting to a certain extent the flow of the water, and is *therefore* an illegal encroachment on the rights of the pursuer. A conclusion of law which, if the facts were as stated above, I think irresistible. It then proceeds to order the removal of the erection, the propriety of which would depend on the various considerations stated by the Lord Justice Clerk in the passage I have just read.

On appeal, Lord Chelmsford, the Lord Chancellor, says ('):

It is in respect of their property in the land that the pursuers dispute the right of the defendant to encroach on the river.

And afterwards ('),

The proprietors upon the opposite banks of the river have a common interest in the stream, and although each has a property in the *alveus* from his own side to the *medium filum fluminis*, neither is entitled to use the *alveus* in such a manner to interfere with the natural flow of the water. . . . It seems to me clear that neither proprietor can have any right to abridge the width of the stream or to interfere with its regular course; but anything done *in alveo* which produces no sensible effect upon the stream is allowable. It was asked in argument whether a proprietor on the banks of a river might not build a boat-house upon it? Undoubtedly that would be a perfectly fair use of his rights, provided he did not thereby obstruct the river or divert its course, but if the erection produced this effect, the answer would be that essential as it might be to his full enjoyment of the river, it could not be permitted.

(That is, as I think, implied by Lord Chelmsford, though not expressly said, if the proprietors of that part of the river where the course is impeded or diverted object.) He goes on :

A fortiori, when the act done is the advancing of solid buildings into the stream, not in any way for the use of it, but merely for the enlargement of the riparian proprietor's premises, which must be an infringement upon the right and interest of the proprietor on the opposite bank. . . . Any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor, and therefore the act being *prima facie* an encroachment, the *onus* seems properly to be cast upon the party doing it to show that it is not an injurious obstruction.

*Which I again think must by implication mean [860 an obstruction injurious to the opposite riparian proprietor, with whose rights it is an interference.

Lord Westbury had, in the course of the argument, said :

If I build a boat-house, though it injures no one, it would seem that any riparian proprietor may complain.

He seems to have (in my opinion very justly) thought that if the pursuer's argument went so far as this it could not be sound. But on consideration he found that it did not go so far. And he says :

I am convinced that the proposition, as it has been laid down in the court below, and as it has received the sanction of your Lordships' judgments, is one that is founded in good sense, and ought to be established as matter of law.

(') Law Rep., 1 H. L. Sc., 53.

(') Law Rep., 1 H. L. Sc., p. 55.

In my view of the case, what was laid down in the court below and received the sanction of this House was, that the pursuer and defender being owners of opposite properties on the Kilmarnock water, each therefore was, there being nothing to show the contrary, proprietor of the *alveus* up to the *medium flum aquæ*, and each had, as incident to his property, the right to insist that the regular flow of the water should continue on his side as it was wont to flow, which in ordinary times would be a benefit; and that nothing should be done to obstruct the regular flow of the water on the other side of the stream, so as to cast more water on his side than had been wont to flow, which at least in times of flood would be a burthen. The defender had, without any right, built an encroachment on his side of the river, which necessarily caused more water to flow on the pursuer's side, and though that encroachment was small, it was such as in a small stream to make a sensible alteration in the flow. That was an injury to the proprietary right of the pursuer, but he was not able to qualify present damage. The decision of the Court of Session was that this was an injury to the proprietary rights of the pursuer, whether he could qualify damage or not, and that he was entitled to insist on the erection being removed, it being from the nature of the property (building land), and the nature of the right infringed, highly probable that there would be damage. All that was said as to the impossibility of telling what a stream, if running, would or might do was in my opinion relevant only 861] to the question *whether there was such an absence of damage as to lead the court, in the exercise of its equitable jurisdiction, to refuse to interfere and order its removal.

It was said in argument in the present case that whether the stream was navigable or not made no difference as to the rights of the riparian proprietors; and that in England at least it made no difference whether the tide flowed or not. I agree to this, but on the question whether an erection in the *alveus* of the stream is of sufficient magnitude to cause a sensible alteration of the flow of the water, I think (though it is unnecessary for this case to consider how that may be) that the magnitude of the stream may be of great importance. The river Amazon is many miles wide, and (assuming the law of Brazil to be the same as that of this country) I think that a proprietor of land on the one bank of a stream of that width would not be in a position to require one on the opposite shore to remove an encroachment of one or two feet into the river, for it would do him no sensible injury, though in the narrow Kilmarnock water such an encroachment did

do the opposite proprietor sensible injury, which, especially seeing it was in a town, and was or might be building land, was very likely to produce substantial damage, though he might not as yet be able to show present damage.

In the case of *Attorney-General v. Lord Lonsdale* ⁽¹⁾ the obstruction was in a tidal river, but it occupied one-third of the bed of the river. In *Attorney-General v. Terry* ⁽²⁾ there was an actual occupation by the piles put in by the defendant of part of what was used for the navigation and wanted for the navigation. The Master of the Rolls intimated an opinion that the Court of Equity might order the piles to be removed, though doing no present damage to the navigation, if they might be a damage hereafter, I apprehend on the ground of the piles being placed on the soil of the Crown, and therefore a wrong to the Crown. How that may be in such a case it is unnecessary to consider. I think it clear law in England, that, except at the instance of a person (including the Crown) whose property is injured, or of the Crown in respect of an injury to a public right, there is no power to prevent a man making an erection on his own land, though covered *with water, merely on a speculation [862 that some change might occur that would render that piece of land, though not now part of the water-way, at some future period available as part of it. I think that the land being covered by water is in such a case a mere accident, and that the defenders are as much at liberty to build on the bed of the river (if thereby they occasion no obstruction) as they would be to build on an island which might at some future period be swept away. And with every respect for the judgment of the learned Lords of Session from whom I differ, I advise your Lordships to hold that there is no such power in Scotland

My Lords, on the question of fact I would not lightly come to a different conclusion from the court below if they had been unanimous, or even if the Lord Ordinary who saw the witnesses and their demeanor, had formed a strong opinion on the result of the evidence. But, as appears from the passages I have read, in the present case the finding in fact comes before your Lordships without any such prestige. And, as it seems to me on such a question as this, the evidence of the surveyors and engineers is of very great weight as to the condition and depth of the river and the position and size of the piers, but in my mind of very little weight as to the mode in which the navigation, by vessels floating down the stream without any locomotive power, was used.

⁽¹⁾ Law Rep., 7 Eq., 377.

⁽²⁾ Law Rep., 9 Ch., 423.

No one of them pretends to have any practical knowledge of such navigation, and it is too exceptional a kind of navigation to have become part of the general knowledge of an engineer.

Of the practical men who were called on both sides, Dugald Macfarlane (called for the pursuer) says distinctly :

If we go to the west side of the east piers of the bridge we keep clear of the intake and catch-water. If we steered straight from the piers we would certainly go on the catch-water.

John Russell says :

That the piers are just where our proper channel was, where we went up and down.

And Neil Black says nearly the same thing, but the cross-sections made on behalf of both parties show that the preferable part of the channel at all events was west of the piers, so that I think these witnesses prove too much. I think the other witnesses for the pursuer are all persons conversant with the towing of boats *up the stream, not with the manner in which boats were conducted down the stream. On the other hand, George Macfarlane and John Stewart, who have had the conduct of every boat that went down since the bridge was built, and certainly are persons of much experience, are positive that in taking boats down they never went nearer the intake than fifteen or twenty feet to the west of it, so as to clear the catch-water; their evidence if believed shows that the spot where the piers now stand was avoided by those who managed the boats.

The Lord Ordinary seems to have distrusted their evidence because he thinks the account they give of the manner in which they have been accustomed to conduct their boats unintelligible; I presume, referring to their statement, that loaded boats have steerage way and answer the helm, and also, as they phrase it, steer themselves, or keep the channel, whilst light boats require to be poled. All agree that such is the fact, and if I were bound to find a theoretical reason for it I should infer that in such a stream as the Leven the upper and the lower strata of water do not flow with a uniform velocity, and that there may be something in the nature of an undertow off the banks. But I am not inclined to reject the evidence of practical men as to a fact, merely because they give a bad theoretical reason for it, and I am not able myself to furnish the right one. I have been told that some years ago the pilots in the English channel uniformly asserted that there was a current setting towards the French shore, and to allow for that supposed current

they always steered to the north of the course which by the chart and compass they should have held. It was ascertained that there was no such current, and some ships were lost because their commanders disregarded the rule of the pilots, because their reason for it was wrong. On further investigation it was found that the deflexion of an unadjusted compass from the action of the iron in most ships was such as make it right, when the ship's head lay either east or west, to steer to the north of the course by chart as indicated by that compass. The pilots were quite right in the fact which they had observed, though quite wrong in their reason. Whether what I have been told is accurate or not, it is a good illustration of what I mean.

I think, therefore, that the balance of evidence is in favor of *the piers being out of the channel where a right [864 of way had been acquired by user, and I think that the court, before ordering the defenders to incur the heavy expense of pulling down a bridge erected in the *bona fide* belief that it was no obstruction, ought to be satisfied affirmatively that it is an obstruction.

There is one point more which I should mention. Something done out of a highway altogether may be a public nuisance, if it renders the use of the highway less safe; for example, if an excavation is made for the purpose of erecting a new house close to a public highway, and left unfenced, so that persons using the way might, if accidentally deviating a little from the way, fall into it, it is a nuisance: *Barnes v. Ward*(¹). But there the neglect of duty is not in making the pit, but in leaving it unfenced. A court of equity in such a case would not order the defendant to fill up the excavation, if he put up sufficient fencing to make it safe. Lord Shand points out that a vessel accidentally deviating from its intended course would now strike a dangerous obstacle, which formerly was not there. Perhaps as things are, the defenders would be responsible for the consequences of an accident of this sort if it happened; but the conclusion, if such a nuisance was proved, would be, not that they must remove the pier, but that they should put up a fender of the kind suggested by Mr. Copland in his evidence. This, however, was not asked for by the pursuers.

I come, therefore, to the conclusion that the appeal should be allowed with costs. I agree that the judgment should be as moved by my noble and learned friend who has preceded me, according to the suggestion of my noble and learned friend opposite, Lord Gordon.

(¹) 9 Com. B., 420.

My noble and learned friend Lord O'Hagan, who heard the argument, but is disabled by a slight accident from attending your Lordships' House and voting on this occasion, requests me to say that he has perused this opinion and concurs in it.

LORD GORDON ('): My Lords, the appellants are proprietors of large manufacturing *works at Dillichip, on the east bank of the river Leven, which flows from Loch Lomond and falls into the Clyde at Dumbarton. A line of railway from Balloch on Loch Lomond to Dumbarton runs along the west side of the Leven, and the appellants desired to connect their works with that railway. To enable them to do so they acquired from Mr. Smollett of Bonhill a piece of ground on the west bank of the river on which to construct the necessary connecting branch and a bridge across the river. Before commencing their operations they caused intimation of the nature of their intended works to be made to the persons who might be supposed to be interested in the navigation of the Leven and of Loch Lomond, and amongst others to Mr. Smollett and the Duke of Montrose, the two largest proprietors on Loch Lomond. Intimation was likewise made to the Loch Lomond Steamboat Company, who were also materially interested. But, after consideration, no objection was made by any of these parties to the proposal. The steamboat company, during the course of the operations, did indeed suggest that the height of the bridge should be increased, and their suggestion was complied with. The appellants also caused intimation of their contemplated works to be made to Sir James Colquhoun of Luss, the author of the respondents. This intimation was made through Mr. Wylie, the factor for Sir James, who, on the 14th of May, 1872, wrote to Mr. Young, the appellants' engineer, that he had been directed by Sir James to state that he "will make no objection, provided his fishing and other rights are not interfered with." I think that the rights here referred to were only the patrimonial rights of Sir James Colquhoun in the estates belonging to him, and that, beyond these, he had not in contemplation the reservation of any rights he might have as a mere member of the public. I think this is confirmed by the letter which the agents of the respondents wrote to the appellants on the 3d of November, 1875, being the first complaint made by the respondents in regard to the bridge, in which they refer to the injury their client's patrimonial rights would sustain by the erection of the bridge; and also by the fact that the

(') Revised by his Lordship in print for the report.

note of suspension and interdict subsequently raised by the respondents was not based on alleged injury to public rights. But in the view which I take of the merits of the case, it is *unnecessary to advert more particularly to the argu- [866
ment which has been submitted to the House in regard to this point.

The building of the bridge now in question was commenced in March, 1875, and the east piers had been erected in the *alveus* of the river and completed by September, and the whole frame of the bridge is said to have been completed by the end of the year. The respondents on the 31st of December, 1875, presented a note of suspension and interdict against the appellants to have them interdicted from erecting the bridge, which had by that time been erected; and on the 26th of January thereafter the respondents raised the present process of declarator, in which they for the first time allege injury to public rights. But while doing so they set forth the injury done to their patrimonial rights as the main ground they have for seeking the removal of the bridge. They say, in the fourth article of their condescendence, that the erection of the pillars will obstruct the passage of salmon up and down the river; and in the fifth article they state:

The most *material interest* which the pursuers have in the matter is the effect the bridge, as it is being constructed, will have on the value or return from the estate under their charge. The erection of the bridge will materially interfere with the transmission of the produce from the farms, and of goods to them. These articles will not be transmitted as conveniently and cheaply as hitherto, but will have to be carried by road or rail, and the value of the lands will be diminished, and the rents to be obtained lessened. The pursuers have been informed and believe that the impediments which the bridge will cause in the conveyance of wood from the pursuers' lands down the Leven will prevent merchants from giving the same price for it as formerly. As a considerable quantity of wood from the estates is likely to be in the market in a few years amounting in value to several thousand pounds, any reduction of price will be a serious loss to the trust estate.

The respondents also allege that

The erection of the pillars for the bridge on the towing-path will interfere with the towing of vessels, inasmuch as the horses will not be worked with the same freedom as formerly; and the erection of the pillars for the bridge in the bed of the river will obstruct the passage of vessels, or at least of the scows or gabbarts up and down the river.

These are the allegations of damage on which the summons is based; and on these the respondents seek to have it found and declared

That the river Leven throughout its course from Loch Lomond until it falls into the River or Frith of Clyde at Dumbarton is a navigable river, free and open to *the public; that the defenders (appellants) have no right to execute any [867
works which will in any way interfere with or obstruct the navigation thereof, or the free use of its banks and of the towing-path along the bank of the said river for

the purposes of navigation; and that the defenders (appellants) have no right to erect any bridges, piers, or other works therewith connected, which will in any way injuriously affect the rights and interests of the pursuers (respondents) as proprietors of salmon fishings in the said river Leven and in Loch Lomond.

And then the summons concludes to have it found and declared that the works complained of do, and will, obstruct the free navigation of the river, and use of the towing-path, to the injury of the respondents, and will also injuriously affect their salmon fishings, and should therefore be removed.

The proof has not supported the respondents' allegations of injury to patrimonial rights and to the towing-path; indeed the proof is in direct opposition to the allegations. Accordingly the respondents do not now contend that the patrimonial rights which, in their summons, they alleged were materially affected, have, in point of fact, been so affected, and, therefore, it is unnecessary further to advert to these. And it is also unnecessary to advert to their allegation of injury to the navigation by the alteration of the towing-path, as that is also now admittedly out of the case. The only point now really at issue in the case is the finding of the Lord Ordinary, which has been adhered to by the court, that the piers recently erected by the appellants in the bed of the river near to the east bank are an obstruction to the free navigation of the river; and that in consequence they should be removed.

The appellants did not at your Lordships' House dispute that the Leven is a navigable river, free and open to the public. But the river is capable of very limited navigation, the only vessels which use it being the few scows or gabbarts referred to on the record, and occasionally, when the river is in flood, the Loch Lomond steamboats on their way to and from Dumbarton for repairs. The fact that the Leven is a navigable river, free and open to the public, infers that the appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along its bank for the purpose of navigation. I think it appears that there are several other bridges having piers on the Leven.

868] *The Leven during the greater part of its course is a fresh water stream, and is so at the point where the bridge in question has been erected. The *alveus* of such fresh water rivers belongs to the proprietors of the properties along their banks. Where such a river is navigable, free and open to the public, the right which the public has in such a river is substantially a mere right to use the river for the purposes of navigation similar to the right the public

may have to passage along a public road or footpath through a private estate. In the case of *Galbraith v. Armour* (¹) in this House, Lord Campbell said :

I must express my clear opinion that, by the law of Scotland, as well as by the law of England, the soil of the public highways is presumed to be in the conterminous proprietors ; and that if a public highway is established by usage over the land of another, the soil is still his, with all his former rights, subject to the public servitude which he has suffered to be established.

And Lord Brougham stated that he entirely agreed in the views stated by Lord Campbell. But though the public has no right of property in such rivers or roads, they have a right to object to any obstruction being placed in the river or road which interferes with or obstructs the use of them to which they are entitled.

But I do not agree with the finding in the Lord Ordinary's interlocutor that the piers recently erected by the appellants in the bed of the river, near to the east bank, are an obstruction to the free navigation thereof. This is a finding of fact which depends on the evidence. I do not mean to refer particularly to that evidence, because it has been fully adverted to by Lord Blackburn. But I have carefully considered it, and I agree in the view of it which your Lordship on the woolsack and his Lordship has taken, and I think it is of importance to keep in view that the judges in the Court of Session were divided in opinion in regard to it. I concur in the opinion of Lord Mure, who goes fully into the facts of the case, that it has not been proved that the piers in the bed of the river do *de facto* obstruct the navigation of the river.

It is contended by the respondents that it is not necessary for them to establish by evidence that the piers in the bed of the river do at present obstruct the navigation, and that it is sufficient *if it is shown that the erection may, [869 at some future time, and under some change of circumstances, cause such an obstruction. The majority of the judges in the Inner House of the Court of Session in this case have adopted this view, and they found strongly on the case of *Bickett v. Morris* (²). But that was a case between two conterminous proprietors having property on the opposite sides of a small stream flowing through the town of Kilmarnock, and each having a right of property *ad medium flum* of the stream ; while as regards the stream itself there was a common interest which entitled each to object to any operation which might interfere with the regular flow of the water. This is very clearly and fully brought out in

(¹) 4 Bell's Appeals, 374, 11th July, 1845.

(²) Law Rep., 1 H. L. Sc., 47.

the opinions of the judges of the Court of Session in the report of the case on the 20th of May, 1864 (*).

The case of *Bickett v. Morris* (†) appears to be quite in accordance with the law laid down in this House in the prior case of *Menzies v. Lord Breadalbane* (July 4th, 1828) (†) the rubric of which is :

Held (varying the judgment of the Court of Session) that an heritor was not entitled to erect a bulwark, or any other *opus manufactum*, on the banks of the river Tay which might have the effect of diverting the stream of the river in times of flood from its accustomed course, and throwing the same upon the lands of an opposite proprietor, although it was alleged that the bulwark was intended to protect the heritor's lands from the flood.

It was contended there that the bulwark, if allowed to be finished, must have the necessary effect of turning the great body of water, which formerly went down upon the south side of the channel, towards the north, upon the complainant's (Sir Neil Menzies') property, and thus overflowing the lands upon that side in a much greater degree than formerly. The House ordered and adjudged :

That the respondent ought to be prohibited and interdicted from the further erection of any bulwark or any other *opus manufactum* upon the banks of the river Tay, which may have the effect of diverting the stream of the river in times of flood from its accustomed course, and throwing the same upon the lands of the appellant.

870] *Lord Eldon, in comparing the law of England and Scotland, said :

This case must be decided by the law of Scotland. Now, with reference to the law of Scotland, this is perfectly clear, that a superior heritor cannot divert any part of a stream to the prejudice of an inferior heritor. It is also clear that an inferior heritor cannot do that which shall cause the water to stagnate to the prejudice of the superior ; that is acknowledged to be clear law.

The cases of *Bickett v. Morris* (†) and *Menzies v. Breadalbane* (†), as well as the cases of *Farquharson v. Farquharson*, 1741 (†), and *Magistrates of Aberdeen v. Menzies*, 1748 (†), which were also referred to as authorities for having the piers complained of in the present case removed, were all cases between adjoining or *ex adverso* proprietors. There was no question of navigation involved in any of these cases, neither was there any case of public right. The right of a conterminous proprietor in a stream dividing his property from that of his opposite neighbor is, in my opinion, very different from that with which your Lordships are now dealing. The Lord President seems to think that there is no difference in principle between the private rights of conterminous proprietors and those of the public. He says :

(†) 2 Court of Sess. Cas. (3d Series), 1082.

(†) Law Rep., 1 H. L. Sc., 47.

(†) 3 Wilson & Shaw, 235.

(†) Morrison, Dict., 12,779.

(†) Ibid, 12,787.

I do not understand that the case of Sir James Colquhoun's trustees is really based upon the notion that they have a right here, as distinguished from that of any other member of the public. But it appears to me that the distinction is one of no consequence in the application of the legal principle. The proprietor on the banks of a stream has an interest to prevent an erection in the *alveus*, because it may interfere with his rights—it may interfere with the flow of the stream, and so injure him. But it is not because he is a proprietor on the banks of the stream, but because, being a proprietor on the banks of the stream, he has an interest in the water, that he has a title to complain, and it is because the public have a right in this water that they, I think, have a title to complain. The title is not so much that of proprietorship as of interest in a running water, and in that respect the title of the complainers here, and the title of the complainer in *Bickell v. Morris* (*) are identical in principle.

With great respect for his Lordship's opinion, I cannot agree with his Lordship in the view that there is no difference in principle between the rights of conterminous proprietors, and the right of the public. I think that the interests which adjoining proprietors have in a stream are numerous, both in the water itself and in *regard to [871 the benefits or injuries which it may cause to their properties, and that these interests give them a right to complain and seek the removal of any impediments to the flow of the river.

But, in my opinion, the interests of the public in such a case as your Lordships are considering are very different from those of conterminous proprietors. The rights of the public are of a limited nature. They possess no right of property in the water itself. They have a right to the use of it only for the purpose of navigation. They have no rights as regards the flow of the water, or the withdrawing of water, if the right of navigation is not affected. If that right is not interfered with, they are not, in my opinion, entitled to complain of operations by proprietors for the beneficial use and occupation of their properties. I think, therefore, that the principles involved in cases between conterminous proprietors are inapplicable to the present case.

The Lord President, in his opinion, says :

The right of the public over a river of this class (that is, of a non-tidal river) is more like a right of way than the right of the public which is represented and protected by the Crown in the case of a navigable river where the tide ebbs and flows; and I am very much disposed to deal with this case as if it were just a right of way along this river, by means of the river, where it is fitted for purposes of navigation.

I agree with his Lordship that the right in question is very much the same as a right of way; and I, therefore, think the principle which was applied by the Second Division of the Court of Session in the recent case of *Sutherland v. Thomson* (22d February, 1876) (*) has an application to the present case. In that case the question related to swing

(*) Law Rep., 1 H. L. Sc., 47.

(*) 8 Court of Sess. Cas. (4th Series), 489.

gates which had been erected across a public footpath ; and there the court held :

That these gates were necessary for the proper use of the respondent's farm, and were so constructed as not to be in any material degree injurious or obstructive to the public in the free use of the path.

And the court found

In point of law that the respondent was entitled to erect said gates across the footpath, and that the appellant was not entitled to remove or destroy the same.

Lord Ormidale, in delivering his judgment in that case, after referring to the case of *Galbraith v. Armour* (*), before 872] referred *to and to the case of *Marquis of Breadalbane v. Macgregor*, in this House, 14 July, 1848 (†) (in which a right was claimed for the public to have stances on a drove road for cattle using the road to rest and pasture upon, and was repelled), said :

If the public, then, has a mere right to pass over the road, and if the *solum* or ground passed over belongs to the conterminous proprietor, it would be a strong thing to hold that the proprietor, or his tenant with his leave and in his right, is not entitled, for the protection and service of his estate, to put up gates which do not unnecessarily, or in any material degree, obstruct the public in the exercise of their right of passage. No authority was cited in support of any such proposition. On the contrary, there is ample authority, I think, in the opposite direction.

And then his Lordship refers to three cases, in regard to gates across public roads, which he holds to support his proposition.

And Lord Gifford, in that case, said :

In reality a public right of footpath is really the same as a servitude right, excepting that the dominant tenement is the whole kingdom, and not a special subject or estate, and no good reason seems to exist why the equitable rights of use which the law secures to the proprietor of a servient tenement should not be given to the proprietor of an estate burdened with a public footpath, provided only its use as a public footpath is not interfered with. It seems to follow from the judgment of the House of Lords in the case of *Galbraith v. Armour* (*), that the *solum* of the right of footpath is in the landlord of the ground, and not in the Crown : the public have nothing but a mere right of free passage over or through the lands which the respondent in the appeal occupies. I am, therefore, of opinion in the present case, that the respondent is entitled, in order to the enjoyment of his land for pasture, to put up such swing gates or wickets as while they will prevent his cattle from straying, will not impede the public right of way.

The case of *Grant and others v. Duke of Gordon*, 9 March, 1871 (†), which had reference to the floating of timber from the Highlands down the river Spey to the sea, is entitled to consideration in the decision of the present case. It was a question between the upper proprietors on the river Spey and the Duke of Gordon as to the rights of the latter as proprietor of a cruive for salmon fishing in the river near the sea. The report of the case bears, and the judgment

(†) 4 Bell's Appeals, 374.

(*) 7 Bell's Appeals, 43.

(†) Mor. Dic., 12,822.

was affirmed by your Lordships' House on the 20th of February, 1782, that the court

Considered a river by which the produce of the country could be transported to the sea to be a public benefit intrusted to the king as *pater patriæ* for the behoof of **his subjects in general which could neither be given away nor abridged by him*; [873 and that this transportation, as the *chief and primary use of the river*, if incompatible with the cruive fishing would prevail over it. They were at the same time of opinion that these rights were not incompatible, if not emulously used, and therefore proceeded to fix certain regulations according to which they were to be exercised.

The case is of importance in so far as while it recognizes a right of floating timber down the river as a *quasi* navigable public right, and as the *chief and primary use of the river*, and which, if incompatible with the cruive fishing, would prevail over it, the court at the same time held that that right of navigation was not so absolute that it was not subject to equitable restrictions when in competition with other rights. And, accordingly, the right of the upper proprietors was held subject to restriction and limitation as regards the periods during which it could be exercised, a restriction which could not have been exercised by the court if the right of navigation had been held to be absolute and not subject to equitable limitations.

I am of opinion that the appellants are entitled, as in a question with the respondents as members of the public, to the full and free use of their property, and to erect a bridge connecting their property on one side of the river with their property on the other. The whole of the intervening *alveus* of the river is their property, and the appellants were entitled to erect piers in the river, provided these piers did not obstruct the navigation. I think it has not been proved that the piers which have been erected do, in point of fact, having regard to their position with reference to the catch-water dyke, obstruct the navigation of the river; and therefore I am of opinion that the respondents have no right to demand their removal.

The views upon which I proceed in advising your Lordships are founded upon what I consider to be the law of Scotland, as found by your Lordships in previous Scotch cases. I observe that Lord Shand, in his opinion, refers to two English decisions as explaining the opinions of English courts with reference to the case of *Bickett v. Morris* (1). But it is necessary to bear in mind that these cases had reference to the rights of the public in tidal rivers, and, according to the law of Scotland as well as in England, the **principles applicable to tidal rivers differ from those* [874 applicable to rivers above the influence of the tide; and in

(1) Law Rep., 1 H. L. Sc., 47.

these cases the Attorney-General, as representing the right of property of the Crown in the *alveus* of the water, was a party as relator.

I concur in the motion that the appeal should be sustained and the interlocutors complained of recalled with costs. I think the proper order is to recall the interlocutors appealed against; to find that the river Leven is a navigable river, free and open to the public; that the appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along the banks of the river for the purpose of navigation; that the works complained of in the summons do not, in point of fact, interfere with or obstruct the navigation of the river; and with these findings to remit the case back to the Court of Session, with instructions *quoad ultra* to assoilzie the appellants from the conclusions of the summons, and to find them entitled to the expenses incurred by them in the Court of Session and in this House.

The following judgment was pronounced by the House:—

Ordered and adjudged,—That the interlocutors complained of be reversed; and the Lords find that the river Leven is a navigable river, free and open to the public; that the appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along the banks of the river for the purpose of navigation; that the works complained of in the summons do not in point of fact interfere with or obstruct the navigation of the river. And with these findings, it is Ordered, that the cause be, and the same is hereby remitted back to the Court of Session in Scotland, with instructions *quoad ultra* to assoilzie the appellants from the conclusions of the summons, and to find them entitled to the expenses incurred by them in the Court of Session: And *it is further Ordered, that the respondents do pay, or cause to be paid to the said appellants, the costs incurred by them in respect of the said appeal to this House, the amount thereof to be certified by the Clerk of the Parliaments: And it is also further Ordered, that unless the costs, certified as aforesaid, shall be paid to the parties entitled to the same within one calendar month from the date of the certificate thereof the Court of Session

in Scotland, or the Lord Ordinary officiating on the bills during the vacation, shall issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

Agents for the appellants: *Grahames & Wardlaw.*

Agents for the respondents: *J. & J. Graham.*

See 17 Eng. Rep., 72 note.

As to the rights of the public and of individuals in navigable rivers or the shores thereof, see

English: Trustees v. Surveyors, 7 Best & Smith, 348; Ipswich Dock, etc., v. Overseers, etc., 7 Best & Smith, 810.

Illinois: Houck v. Yates, 82 Ills., 179.

Massachusetts: Blackwell v. Old Colony, etc., 123 Mass., 1.

Minnesota: Rippe v. Chicago, etc., 23 Minn., 18; Brisbine v. St. Paul, etc., 23 Minn., 118.

New Brunswick: Doe v. Littlehale, 5 Allen, N. B., 131; Queen v. Taylor, 5 Allen, N. B., 243; Byron v. Stimpson, 1 Pugal. & Burbridge, 697; McMillan v. Southwest, etc., Id., 715.

New York: People v. N. Y. and

Staten Island Ferry Company, 68 N. Y., 71.

Nova Scotia: Esson v. Mayberry, 1 Thompson, Nova Scotia, 186.

Pennsylvania: Philadelphia v. Scott, 81 Penn. St. R., 80.

Tennessee: Spaine v. Tennessee, etc., Thompson's Tenn., Cases, 253.

United States, Supreme Court: Pound v. Turck, 95 U. S., 429; Northern, etc., v. Chicago, 7 Reporter, 885.

United States, Circuit: Forsyth v. Sneale, 7 Reporter, 262, Indiana Dist., Drummond, J.

Wisconsin: Olson v. Merrill, 43 Wisc., 203; Delaplaine v. Chicago, etc., 43 Wisc., 214; Boorman v. Sunnuchs, 43 Wisc., 233; Diedrich v. N. W. U. R. R., 43 Wisc., 248; Stevens, etc., v. Reilly, 44 Wisc. 296.

C A S E S

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE,

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE QUEEN'S BENCH DIVISION,

AND BY THE

COURT FOR CROWN CASES RESERVED,

X L V I C T O R I A .

[2 Queen's Bench Division, 814.]

April 14, 1877.

[IN THE COURT OF APPEAL.]

**314] *JONES and Others v. THE VICTORIA GRAVING
DOCK COMPANY.**

Statute of Frauds, s. 4—Agreement not to be performed within a year—Contract contained in several Documents—Identification by Parol of Documents mentioned in Signed Document—Effect of Signature by Chairman of Minute Book of Company pursuant to the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67—Appeal—Reference—Special Case—17 & 18 Vict. c. 125, ss. 5, 82.

The defendants, a company incorporated under the Companies Act, 1862, entered into negotiations with the plaintiffs to employ them as managers for five years. A draft agreement was prepared and submitted to the plaintiffs; they objected to some of its terms, and thereupon the directors of the defendants' company wrote out a paper modifying the draft agreement in some particulars, but concluding with the words "all other provisions as in draft." The plaintiffs agreed to the draft agreement as modified by this paper. The secretary of the defendants' company entered in the minute book a resolution that the plaintiffs having signified their willingness to undertake "the management of the company's works upon the terms of the draft agreement submitted to them by the board, it was resolved that the said agreement be engrossed in duplicate, signed, sealed, and executed." At the next meeting of the

directors of the defendants' company the chairman signed the above resolution pursuant to the Companies Act, 1862, s. 67:

Held, in the Queen's Bench Division by Mellor and Lush, JJ., that there was a valid contract within the Statute of Frauds, s. 4, by the defendants to employ the plaintiffs during five years: for the terms of the service were completely ascertained when the plaintiffs assented to the draft agreement as modified by the paper, and it was immaterial that the directors of the defendants' company intended the contract as finally arrived at to be afterwards "engrossed in duplicate, signed, sealed, and executed;" and the draft agreement and the paper modifying it might be identified by parol as the draft agreement referred to in the resolution entered in the minute book; and although the signature of the chairman was affixed to the minute book for the purpose of verifying the accuracy of the entry therein contained, pursuant to the Companies Act, 1862, s. 67, it nevertheless operated as an admission of the contract contained in the draft agreement and the paper, and was sufficient to satisfy the Statute of Frauds, s. 4.

By an order of reference made by consent, and before the coming into operation of the Judicature Acts, it was ordered that neither the plaintiffs nor the defendants should bring any writ of error against each other concerning the matters referred. The arbitrator made an award dependent on the opinion of the court upon a special case stated by him. The court gave judgment for the plaintiffs. The defendants appealed:

Held, in the Court of Appeal, that no appeal could be brought.

Gumm v. Fowler (2 E. & E., 890; 29 L. J. (Q.B.), 189) observed upon.

JONES BROTHERS, the plaintiffs in this case, had brought an *action against the Victoria Graving Dock Com- [315
pany, the defendants, for damages for having been dismissed from their employment.

By an order of Mr. Justice Blackburn, dated the 28th of June, 1875, and expressed to be made by consent, the action was in the usual manner, referred to an arbitrator, one of the clauses (on a printed form) being, "And I further order, by and with such consent as aforesaid, that neither the plaintiffs nor the defendants shall bring or prosecute any action or suit at law or in equity against the said arbitrator, or bring any writ of error, or prefer any bill in equity against each other of and concerning the matters so as aforesaid referred."

The arbitrator, on the 30th of May, 1876, made an award that the plaintiffs were dismissed from the service or employment of the defendants under such circumstances that the plaintiffs would be entitled to damages assessed at £1,500, provided there was a memorandum of a new agreement to satisfy the 4th section of the Statute of Frauds; and stated the following special case:—

1. The firm of Jones Brothers of Liverpool, the plaintiffs in the action, in 1866 entered into an agreement with the defendants to act as managers of their docks in London for a space of eight years, which would terminate on the 1st of January, 1874. Shortly before the expiration of the term of eight years, negotiations were commenced between the parties relative to a continuation of their management by

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the plaintiffs on certain terms as to remuneration and otherwise.

2. Messrs. Gedge, Kirby & Millett were the solicitors acting for the defendants, and as such in December, 1873, drew up a draft agreement in duplicate relative to the new terms, one part of which was laid before Messrs. Jones and the other retained by Messrs. Gedge, Kirby & Millett. Messrs. Jones objected to certain of the proposed terms, and both parts of the agreement were then altered in red ink by Mr. Gedge, who acted throughout on behalf of his firm, with a view of meeting Messrs. Jones' objections; and one of such parts, hereinafter called Jones' draft, was towards the end of December, 1873, re-submitted to Messrs. Jones. The other part is hereinafter called Gedge's draft.

316] *3. By clause 8 of these drafts it was stipulated that an annual account should be taken in January in each year, so as to show among other things the profit and loss of the company in their business.

4. The following is clause 11 as it then stood in both drafts with the red ink alterations (herein printed in italics).

"In taking such annual account as aforesaid, when the gross profits of the year have been ascertained, the following deductions shall be made therefrom for the purposes of this agreement: 1. *A sum of £200 in each year to be paid to or retained by the said Messrs. Jones Brothers for their travelling expenses in and upon the company's business.* 2. *A sum of £500 in each year towards the interest paid by the company upon its debentures.* 3. A sum of £600 in each year for the remuneration of the directors and secretary, and for office expenses in London. 4. All law charges incurred or paid by the company in the year. 5. A sum equal to interest at the rate of 10 per cent. per annum upon all the paid capital of the company over and above the sum of £142,000. 6. Two sums, *one of £400 and the other of £300 in each year*, to be dealt with in manner hereinafter mentioned, and the sum remaining to the credit of profit and loss account, after making these deductions, shall be considered and is hereinafter referred to as the net profits of the company for the year, in respect of which any such account shall have been taken." The figure £142,000 in the above clause was, under any view of the circumstances, an error in the statement of the amount of capital, and under any circumstances would require to be largely increased.

5. By clause 12 it was stipulated that the plaintiffs should receive annually one equal eighth part of the net profits of

the company up to the sum of £8,000, and one equal fourth part of such net profits as should be in excess of £8,000.

6. On Jones' draft being re-submitted to the plaintiffs as mentioned in paragraph 2, John Jones, one of the members of Jones Brothers, on their behalf objected to the proposed terms as altered and modified in red ink, and upon the 1st of January, 1874, a board meeting of the company was held, at which A., who was a director of the company, and whom the company had authorized to act on their behalf with Mr. Gedge relative to the preparation *and making [317 of the agreement, was present. At this meeting Mr. John Jones again refused to agree to the proposed terms. Mr. John Jones thereupon, being requested so to do, retired from the room, and in his absence certain modifications of the proposed agreement were considered.

7. A. then at the board meeting drew up a paper which was intended by him to represent the ultimatum of the board with reference to the various objections and requirements raised by Messrs. Jones and Mr. John Jones on their behalf. It was as follows:—

“That interest be charged at 5 per cent. instead of 10 per cent. on new capital for extending business. The charge of £500 per annum, interest on debentures, not to be made against gross profits. The minimum salary to be £500 per annum. The charges for insurance (£300) and depreciation (£400) to be as in the draft. All other provisions as in draft.”

This paper was, on Mr. John Jones being called into the room, submitted to him as the utmost limit to which the defendants' board would go. Mr. John Jones on reading the paper desired to consult his brothers, the other members of the firm of Jones Brothers, who were at Liverpool, on the terms thereof, and took it away with him from the board meeting with that object.

8. The effect of the proposals contained on the paper was to alter the 11th clause of the agreement proposed to Messrs. Jones, as by them understood, and under the circumstances rightly understood, as follows:—

“In taking such annual account as aforesaid when the gross profits of the year have been ascertained, the following deductions shall be made therefrom for the purposes of this agreement: 1. A sum of £200 in each year to be paid to or retained by the said Messrs. Jones Brothers for their travelling expenses in and upon the company's business. 2. A sum of £600 in each year for the remuneration of the directors

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and secretary, and for office expenses in London. 3. All law charges incurred or paid by the company in the year. 4. A sum equal to interest at the rate of 5 per cent. per annum, upon all the share or loan capital of the company over and above the sum of £172,000 raised, called up, or 318] issued for the *purpose of enlarging the docks or extending the business of the company."

The remaining paragraph of the 11th clause was as it already stood in Messrs. Jones' draft.

9. The next meeting of the board was held on the 7th of January, and Mr. John Jones attended and stated that the plaintiffs accepted the terms proposed to them, and on this acceptance the arbitrator found that there was a complete contract between the parties.

10. Mr. Gedge, who was ignorant of the terms contained in the paper submitted to Messrs. Jones by A., had in the meantime altered his (Gedge's) draft, so as to embody what he believed was the effect of the negotiations between the parties. The result was that the 11th clause of the proposed agreement was left by him in effect identical with the clause as set out in the 8th paragraph in this case, except that the figure 162,000 was inserted instead of 172,000. This figure of 162,000 was in any case an error on the part of Mr. Gedge, and in any event would require alteration subsequently.

11. After the acceptance mentioned in the 9th paragraph of this case, the following resolution was written by Mr. Gedge on Gedge's draft:—

"Resolved, that the draft agreement with Messrs. Jones be approved and engrossed in duplicate, and that the seal of the company be affixed thereto."

The resolution was then put to the board, A. being one of it, and carried, whereupon the chairman wrote on Gedge's draft the following:—

"Jan. 7, '74, carried unanimously. Claud Hamilton, chairman."

12. Before the next meeting, but from notes taken at the preceding one, the secretary of the company entered the following minute in the minute book:—

"Mr. John Jones having attended and signified on the part of himself and brothers their willingness to continue the management of the company's works upon the terms of 319] the draft agreement *submitted to them by the board,

it was resolved that the said agreement be engrossed in duplicate, signed, sealed, and executed."

The words "draft agreement" in the above minute, as entered in the minute book, mean "Jones' draft" as altered by the terms expressed on the paper drawn up by A., and hereinafter called B, and by him given to Messrs. Jones.

13. Lord Claud Hamilton, as the first business at the next board meeting of the company, on the 12th of March, signed the above minute in the words and figures following:—

"Read and confirmed: Claud Hamilton."

14. At the meeting on the 7th of January the paper B was not produced by Mr. John Jones. Mr. Gedge, however, obtained from him Jones' draft, and having altered it in accordance with his, Gedge's, idea of what the agreement was, sent it to be engrossed, and sent the engrossment to Messrs. Jones to be signed; they thereupon objected to the figure of 162,000, which was entered in the 11th clause, and a correspondence ensued between Mr. Gedge, the secretary of the company, and Messrs. Jones, the result of which was that the matter stood over to be discussed at the next board meeting, which took place, as before-mentioned, on the 12th of March. The first business thereat was that Lord Claud Hamilton signed the minute of the previous meeting as entered in the minute book by the secretary of the company.

15. At the meeting on the 12th of March, on its being mentioned that Messrs. Jones had taken objection to sign the engrossed agreement containing the figure 162,000, a resolution was passed breaking off all further negotiations.

16. Mr. Gedge, at the time when Lord Claud Hamilton signed the memorandum indorsed on Gedge's draft, did not know of document B, and A. had forgotten its contents. Had A. been aware that the true effect of the proposals mentioned in paragraph 7 was to alter the 11th clause of the proposed agreement, as mentioned in paragraph 8, he would not have made them or assented thereto. When, therefore, the minute states that "it was resolved that the said agreement be engrossed in duplicate, signed, sealed, and executed," the entry, as far as A. was concerned, was not a true entry of the facts.

18. The court to have power to draw inferences of fact.

*The question for the opinion of the court was [320
"Whether, under the above circumstances, there is a memorandum of the new agreement such that an action can be

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brought by Messrs. Jones in respect of the said sum of £1,500."

If the court should be of opinion in the affirmative, then judgment was to be entered for the plaintiffs for the said sum of £1,500 and costs incurred after the date of award. If the court should be of opinion in the negative, then judgment is to be entered on the counts for wrongful dismissal for the defendants, and costs incurred after the date of the award.

The draft agreement drawn up in duplicate, as in the 2d paragraph of the special case is mentioned, commenced thus: "An agreement made this . . . day of . . . , 187 , between the Victoria Graving Dock Co., Limited, herein-after called the company, of the one part, and John Jones, Charles Jones, and James Jones, all of Liverpool, and trading under the style or firm of and hereinafter called Messrs. Jones Brothers, of the other part." The draft recited, amongst other things, that the company had been incorporated under the Companies Act, 1862, that the directors did, on the 1st of January, 1866, appoint Messrs. Jones Brothers to be managers of the company for a period of eight years thence next ensuing, and that it had been agreed that Messrs. Jones Brothers should continue to act as managers of the company for the period and upon the terms and conditions therein set forth. By the first clause Messrs. Jones Brothers were constituted the sole agents and managers of the company from the 1st of January, 1874, for a period of five years. In addition to the clauses mentioned in the special case, the draft agreement contained others providing for the conduct and management of the business and funds of the company, and for the submission of disputes to arbitration, and it ended with the words, "In witness, &c."

Jan. 16. *A. Wills*, Q.C. (*Rolland* with him), for the plaintiffs, cited 2 Taylor on Evidence, ch. 18, par. 937, page 901 (6th ed.); *Birkmyr v. Darnell* ('); *Durrell v. Evans* ('); 321] *Ridgway v. *Wharton* ('); The Companies Act, 1867 (30 & 31 Vict. c. 131), s. 37.

Benjamin, Q.C. (*Holl* and *Douglas Walker* with him), for the defendants, cited *Peirce v. Corf* ('); *Baumann v. James* ('); *Hubert v. Treherne* ('); *Smith v. Webster* (');

(1) 1 Sm. L. C., 810, at p. 818 (7th ed.), referring to *Shortrede v. Cheek* (1 A. & E., 57; 3 N. & M., 866) and *Bateman v. Phillips* (15 East, 272).

(*) 1 H. & C., 174; 81 L. J. (Ex.), 337.

(*) 6 H. L. C., 238; 27 L. J. (Ch.), 46.

(*) Law Rep., 9 Q. B., 210.

(*) Law Rep., 3 Ch. 508.

(*) 3 Man. & G., 748; S.C., sub. nom. *Hubert v. Turner*, 4 Scott, N. R., 486;

11 L. J. (C.P.), 78,

(*) 3 Ch. D., 49,

Caton v. Caton ('); *Peek v. North Staffordshire Ry. Co.* ('). The Companies Act, 1862 (25 & 26 Vict. c. 89), s 67.

The arguments are sufficiently mentioned in the judgment of the court.

Cur. adv. vult.

Jan. 23. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J.: The question submitted to us is "Whether, under the circumstances above stated, there is a memorandum of the new agreement such that an action can be brought by Messrs. Jones in respect of the said sum of £1,500:" the contention on the one hand being that the signature of the chairman to the minutes of the 7th of January does, and on the other that it does not, constitute a signature to the agreement so as to satisfy the requirements of the 4th section of the Statute of Frauds.

Mr. Benjamin's argument on the part of the defendants embraced several heads of objection, which he contended were involved in the answer to be given to the foregoing questions. Each of these objections we proceed to consider.

He contended, first, that notwithstanding the finding in the 9th paragraph, which is, in effect, that upon the acceptance by the plaintiffs of the terms proposed to them as a modification of the 11th clause of the draft, there was a complete contract between the parties, the court can see that this is a wrong inference from the facts stated, and that we are bound either to disregard that statement, or to construe it in a sense different from what the words ordinarily import, and to hold that the terms agreed on were merely the heads or leading stipulations of the contract, which *were [322 to be afterwards elaborated into detail, and supplemented or varied, as the case might be, when the contemplated deed should come to be settled; in other words, that the parties were not to be bound at all except by deed, and that anything preliminary to the execution of that instrument was to be regarded as negotiation only; and, consequently, that the signature, supposing it to be otherwise sufficient, was not the signature to an "agreement" or to a "note or memorandum of an agreement," but to a mere outline which required filling up in order to become an agreement.

We are unable to discover any ground for this objection. The duplicate draft sent to the plaintiffs in the first instance is in the form of a complete contract. It commences in the usual way: "An agreement made between," &c. (naming

(') Law Rep., 2 H. L., 127.

(') 10 H. L. C., 473, at p. 568; 32 L. J. (Q.B.), 241, at p. 270.

the parties on both sides); it contains numerous minute stipulations, leaving apparently nothing to be supplied, and concludes with the usual formula, "In witness, &c." The only alteration proposed and agreed to was the series of stipulations contained in the paper drawn up by A., and which was intended to represent the ultimatum of the board with reference to the various objections and requirements raised by the plaintiffs. The paper so drawn up by A., concludes with the words, "all other provisions as in draft:" all the details were settled; and when that paper was categorically accepted by the plaintiffs as the only amendment or alteration in the draft agreement required by them, all discussion as to terms was at an end. Nothing is said in either paper about any further document being prepared, and even the resolution of the company set out in the 12th paragraph, upon which so much stress was laid, does not say that a deed embodying those terms shall be prepared and executed, but that "the said agreement be engrossed in duplicate, signed, sealed, and executed;" not a new document based upon that agreement containing other terms, but a copy of that draft itself, as modified by the paper drawn by A., was to be the one, which was to be executed as a deed, and was intended only as a matter ancillary to the actual agreement, which was contained in the original draft as amended by paper B. It does not appear that the plaintiffs contemplated even a sealed agreement, but whether 323] they did or not, neither party could claim to *make any alteration in any particular from the draft so agreed upon.

Mr. Benjamin dwelt much upon the fact that the amount of the old capital was not stated in the draft B; but that of itself does not argue that the stipulation was considered imperfect, or show an intention to have anything more explicit. The parties apparently had not agreed what the amount was, and this was left as a matter to be ascertained; and we cannot suppose it could not have been ascertained, in case any difficulty should arise thereafter upon that subject. The defendants, therefore, have failed to show that this was not what it purported to be—a complete "agreement" between the parties.

The next point on which the defendants rely is that the signature of the chairman to the minutes of the meeting of the 7th of January, which minutes were read and confirmed on the 12th of March, was not a signature within the meaning of the act. This objection was based upon three grounds.

First, it was contended that the signature of the chairman

to the minutes was put in order to verify the proceedings of the board in obedience to the Companies Act, 1862⁽¹⁾, and not in order to attest or verify the contract, and that as the signature was put *alio intuitu*, it cannot be available for the purpose of satisfying the Statute of Frauds. We think there is more ingenuity than force in this argument. The signature required by the 4th section is not of the substance of the contract; it is matter of procedure only (*Leroux v. Brown*⁽²⁾), and is required as evidence of the contract. To prevent frauds and perjuries, the act will not allow any other kind of proof than the writing itself (if it be in writing) or a written admission that the contract was made, and that it was signed in either case by the party to be charged. But so that this kind of "evidence" is given, it matters not [324 that the memorandum was not made at the time, or for what purpose the signature was put, if only it was put to attest the document as that which contains the terms of the contract. Now the minute affirms that the company at their previous meeting had submitted to the plaintiffs a draft agreement, and that the plaintiffs had expressed their willingness to continue the management of the company's works upon the terms of that draft, and that the company then resolved that "the agreement should be engrossed, sealed, and executed." The chairman attests by his signature the accuracy of the minute, and that it had been at that second meeting read and confirmed. What is this but an assertion, under the hand of the company's agent, that the company had entered into the agreement which was contained in the draft referred to. It is not the less efficient as a signed admission of the contract, because it was made as a record of the proceedings of the company under the obligation of the Companies Act, 1862, s. 67. The question is not what its object was, but whether it is a written and signed statement of the contract.

Secondly, it was objected that the draft, not having been itself signed, could not be connected by parol with the signed statement. This point was one of those argued in the House of Lords in *Ridgway v. Wharton*⁽³⁾, cited in the

(1) By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67, "Every company under this act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company, in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose; and

any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings."

(2) 12 C. B. 801; 22 L. J. (C.P.), 1.

(3) 6 H. L. C. 288; 27 L. J. (Ch.), 46.

argument, and conclusively disposed of by the judgment of the House in that case.

The third objection was that the minute verified only draft B, and that was only one of the articles of the agreement, and consequently part only of the contract. But that draft also in terms incorporates itself with the original draft, and there can be no more objection to identifying the draft so referred to by parol than there is to identifying draft B as the draft referred to in the minute. The two together manifestly make up the entire agreement; B being obviously a substitute for the 11th article of the original draft.

Great stress was laid by Mr. Benjamin upon the indorsement on Gedge's draft set out in paragraph 11 of the case and the signature of the chairman thereto, and it was argued that that was the contract, if there was one, which the company signed. It is clear, upon the statements in the case, that the resolution was indorsed upon that draft by mistake, and upon the supposition that it had been altered in accordance with draft B. Whether that indorsement and signature could have been applied to draft B, if there had been no other signed recognition of it, we need not consider. It is enough to say that it cannot have the effect of neutralizing the signed minute, which in terms referred to the draft agreement submitted by the board to the plaintiffs, and which was without reserve accepted by the plaintiffs.

We therefore give judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

The defendants appealed.

April 14. *Wills*, Q.C. (*Rolland* with him), for the plaintiffs, objected that there could be no appeal in this case: In the first place, where an arbitrator has, under the 5th section of the Common Law Procedure Act, 1854, stated a case, there can be no appeal in the nature of a writ of error: *Gumm v. Fowler* (1): for the decision of the Queen's Bench Division is not a judgment of the court on which under s. 32 error might be brought, but is merely the opinion of the court on which judgment may be entered pursuant to the terms of the award. Secondly, there is an express agreement not to bring any writ of error, which must mean not to appeal, and a similar agreement was held to be a bar to any appeal in *Gumm v. Fowler* (1), which was decided in 1860, and has ever since been acted upon (2).

(1) 2 E. & E., 890; 29 L. J. (Q.B.), 189.

(2) See *Courtauld v. Legh*, Law Rep., 4 Ex., 187.

Benjamin, Q.C. (*Holl* and *Douglas Walker* with him), for the defendants: The defendants are not bringing a writ of error, or taking proceedings against the arbitrator or any one. The arbitrator has given a conditional award, and has not said that the parties may not appeal against the decision of the Queen's Bench Division. This is not an appeal against the award, but a proceeding collateral to it. The parties have had the opinion of one branch of the Supreme Court, and there is nothing to prevent them from having the opinion of the Court of Appeal, which is another branch. In *Gumm v. Fowler* (¹), the agreement not to *bring [326 a writ of error was clearly misinterpreted: for the words were insensible, writs of error having been abolished in civil cases by the Common Law Procedure Act, 1852, s. 148. Any judgment of the Queen's Bench Division must, under the Supreme Court of Judicature Act, 1873, s. 19, be subject to appeal.

LORD COLERIDGE, C.J.: I am of opinion that the preliminary objection must prevail. This was an action which was referred in 1875 (before the coming into operation of the Judicature Acts), under the powers of the Common Law Procedure Act, 1854, and the order refers the cause "to the award, order, arbitrament, final end, and determination of the arbitrator," who is to have all necessary powers and so forth. At that time the Common Law Procedure Act was in force, as, indeed, it is now; and the 5th section of the Common Law Procedure Act (¹) is to be taken in conjunction with this order of reference. [The Lord Chief Justice then read the section and the finding on the award.] I may observe that the words in the 5th section "if so ordered" must mean "if ordered by the arbitrator"—they cannot mean "by the court;" at least, it would be a very strange and unreasonable construction of the section to say that the judgment may, if ordered by the court, be entered according to the opinion of the court; for if the court has to order the judgment to be entered, of course it would order it to be entered in accordance with the opinion that has been pronounced by the judges of the court. In this case the order that the judgment should be entered is, according to the true and proper construction of the 5th section of the Common Law Procedure Act, 1854, an order made by the arbitrator himself. The Queen's Bench Division gave judgment in favor of the plaintiffs upon the question referred to them as to the Statute of Frauds, and, thereupon, under the order of the arbitrator, judgment is entered

(¹) 2 E. & E., 890; 29 L. J. (Q.B.), 189.

(²) 17 & 18 Vict. c. 125, s. 5.

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for the plaintiffs in the Queen's Bench Division of the High Court for £1,500 and costs. This is an appeal from that judgment, and the objection to it is that no appeal will lie.

The objection is on two grounds: first, that this was a 327] proceeding *under the Common Law Procedure Act, 1854; that the court did not give a judgment, and that this was a mere question asked of the court as to one portion of the whole subject-matter of the arbitration; that the answer of the court was for the instruction of the arbitrator; that the judgment was the judgment of the arbitrator, and not of the court; and that the 32d section of the Common Law Procedure Act, which says that "error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary," has no application, because this is not a judgment of the court, but of the arbitrator. If the matter stood on the Common Law Procedure Act, I should be of opinion that this was a judgment of the arbitrator, because it seems to me that the matter is substantially still in his power. The arbitrator upon one specific point asked the opinion of the court, and in order to prevent the case coming back to him, having made up his mind to act according to the opinion of the court on the question of law, he gives his award as the court may decide upon that question. If the court decides it one way, then judgment is to be entered for the plaintiffs; if it decides the other way, then the judgment is to be entered for the defendants. I should, therefore, have thought that if it stood on the Common Law Procedure Act alone the objection was well founded.

But the objection does not stand on the Common Law Procedure Act alone and on the construction which we are to give to it, for it is said that the parties have expressly agreed that there shall not be any writ of error or appeal. We find this very question raised in *Gumm v. Fowler* (¹), which is hardly to be distinguished from this case. In that case the court held substantially, that these words as to bringing no writ of error really meant that there should be no questioning of the opinion of the first court whose opinion was asked. It has been pointed out that a writ of error was not applicable to the particular case—that a writ of error would not in that case have lain. It would have lain if procedure by writ of error at that time existed, but it did not exist, therefore the Court of Queen's Bench in that case had to give a reason- 328] able *interpretation to the expression "writ of error;"

(¹) 2 E. & E., 890; 29 L. J. (Q. B.), 189.

and they held that the parties agreeing that there should be no writ of error, meant to agree that there should be no questioning of the judgment of the first court which the arbitrator consulted, and that the decision of the arbitrator should be final, subject to his asking the opinion of the court as to this or that particular matter. I am, myself, not at all disposed to differ from the judgment which was pronounced in the case of *Gumm v. Fowler* (*). The court consisted of the present Lord Chief Justice, Mr. Justice Crompton, Mr. Justice Hill, and Mr. Justice Blackburn. They were unanimous, and we are given to understand that it has been an unquestioned decision from that time to this. It appears to me, therefore, that if I look at the terms of the Common Law Procedure Act, or if I look at the terms used by the parties as interpreted by the authority of this case, neither under the Common Law Procedure Act, nor consistently with the agreement between the parties, can the judgment of the Queen's Bench Division be open to appeal. Mr. Benjamin very properly brought before us the strong language of the Judicature Act, and undoubtedly if this were an order of the Queen's Bench Division of the High Court of Justice it would seem to come within the very wide words that every order may be questioned upon appeal. But I am of opinion in the first place, that this is not an order within the meaning of that section. This is not an order of the High Court, and the proceedings before the Queen's Bench Division were simply ministerial in performing that which the arbitrator himself had jurisdiction to do—merely pursuing his directions in entering the judgment as he had ordered it to be entered; and therefore within the meaning of the Judicature Act this is not a judgment or order of the Queen's Bench Division. I should *prima facie* be of that opinion; but independently of that I think it clear that the parties had agreed that there should not be an appeal. The words "writ of error" in this order of reference, made before the Judicature Act came into operation and before proceedings in error were altogether abolished, must receive a reasonable interpretation, and must mean that the parties shall not controvert *on appeal [329 the finding or decision of any court to which the arbitrator shall refer any question. On that ground, also, I hold that there is no appeal.

BRAMWELL, L.J.: The question which the parties have argued before us is whether there is jurisdiction to hear this appeal. One point taken is, that the parties have agreed

(*) 2 E. & E., 890; 29 L. J. (Q.B.), 189.

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that there shall be no appeal, and that this application is a breach of that agreement. That, in my opinion, must be decided in favor of Mr. Wills' contention; I am of opinion that this is an appeal contrary to the agreement of the parties, and therefore my judgment is in favor of Mr. Wills upon that contention.

If this be a matter in which the arbitrator is merely asking the advice of the court, I should think that that advice when given is not an order from which there could be an appeal. But I am not without a misgiving on the matter when I read the words in the 5th section of the Common Law Procedure Act, 1854. The arbitrator may state his award as to the whole or any part thereof in the form of a special case. Now what is that in plain English? It is simply making an award in the shape of a special case, and if an arbitrator appointed merely to find the facts in an action states a special case, it is clear that an appeal would lie from it under the 32d section of the act. He may, as to some matters, conclude at once, and as to other matters he may state a special case. The 5th section goes on: "and when an action is referred"—not otherwise, and I suppose where there is no action referred the ordinary application would have to be made for leave to issue execution—"judgment if so ordered may be entered according to the opinion of the court." It appears to me that the effect is that, unless the parties have agreed to the contrary, the arbitrator instead of awarding in the matter may state a special case for the court to give their judgment upon. Notwithstanding my very great respect for the judges who expressed the opinion they did in *Gumm v. Fowler* (¹), I have much misgiving with respect to it; therefore I only put my judgment on this ground, that I think this appeal is contrary to the agreement which the defendants, I have no doubt, most unwittingly, entered into.

330] *BRETT, L.J.: I can only agree with the decision of the Queen's Bench Division on the same ground which my Brother Bramwell has just stated, namely, that the parties have by their own agreement precluded themselves from appealing.

I should otherwise have had very great doubts whether an appeal does not lie. I should have very great doubts whether it did not lie under the Common Law Procedure Act, and I should have had still more doubts whether it does not lie under the Judicature Act. I agree that, according to section 5 of the Common Law Procedure Act, 1854,

(¹) 2 E. & E., 890; 29 L. J. (Q.B.), 189.

it is at the option of the arbitrator whether he will state a case or not; but if he does elect to state a case, he is to state the award in the form of a special case, and I have very great doubt whether the effect of that is not to put him in the position of a person who is to state a case for the opinion of the court, or whether, at all events, it is not his award with the facts upon the face of it, which if it is erroneous and wrong would be the subject of appeal. Moreover, with the greatest deference, I have considerable doubt whether the words "if so ordered," inasmuch as they are to apply to a judgment in an action which is the judgment of the court, do not apply to the court and not to the arbitrator. I was not aware that we were about to enter into that consideration, I therefore only express considerable doubt about it, and I desire to reserve, so far as my own individual judgment is concerned, every such question which may arise where there is no agreement by the parties that they will not appeal.

But I think that the words of this reference do, according to the decision in *Gumm v. Fowler* (1), amount to an agreement that there shall be no appeal against the opinion of the court or the decision of the arbitrator. Whether I should have thought so or not at the time when that case was decided, I do not know. But that case was decided in 1860, and the interpretation then given to those words has been adopted in the recognized books of the profession ever since. Therefore, I think it must be taken that these parties, when they entered into this agreement of reference, must have intended that the meaning of those words should be the *meaning given in *Gumm v. Fowler* (1), and [331 that, therefore, there is an express agreement here that there should be no appeal.

Appeal dismissed.

Solicitors for plaintiffs: *W. W. Wynne*, for H. Forshaw & Hawkins, Liverpool.

Solicitors for defendants: *Gedge, Kirby & Millett*.

(1) 2 E. & E., 890; 29 L. J. (Q.B.), 189.

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Ward v. Hobbs.

[2 Queen's Bench Division, 331.]

April 21, 1877.

WARD V. HOBBS (*).

False Representation—Contagious Disease, Animals affected with—Sale in Market—Implied representation that Animals not suffering from Disease—Conditions of Sale—Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 57.

A person who sends animals destined for human food to a public market for sale impliedly represents that they are, so far as he knows, not infected with any contagious disease dangerous to animal life; and a condition of sale that they are to be "taken with all faults" does not negative or qualify this representation.

THIS was an action for breach of warranty and false representation as to the condition of certain pigs sold by the defendant to the plaintiff.

At the trial before Brett, J., it appeared that the pigs had formed part of a herd, many of which had previously died of typhoid fever, a disease very infectious and fatal to animal life. They were sent in an infected state by the defendant to a public market for sale by auction, and were purchased there by the plaintiff. At the time of the sale they showed no outward symptoms of the disease, but, as appears hereafter from the judgment, in the opinion of the court there was evidence to go to the jury that the defendant knew when he sent the pigs to market that they were infected with the disease. The defendant made no express representation as to the condition of the pigs; and the sale was subject to certain conditions of sale, one of which was as follows: "No warranty will be given by the auctioneer with any lot, and as all lots are open for inspection previous to the commencement of the sale, no compensation shall be 332] made in respect of any *fault or error of description of any lot in the catalogue." After the pigs were removed from the market by the plaintiff's servants symptoms of the disease appeared among them. The pigs affected ultimately died, and the plaintiff incurred considerable loss, to recover which he brought this action.

On these facts the learned judge refused to nonsuit the plaintiff, and the jury found a verdict for the plaintiff for £66 19s., the amount of the loss. Judgment was accordingly entered for the plaintiff, leave being reserved to the defendant to move to enter the judgment for himself by way of nonsuit, on the ground that there was no evidence to go to the jury of a warranty or misrepresentation as to the condition of the pigs.

(*) Reversed, 3 Q. B. Div., 150, 6 Central L. J., 107, to appear in 22 or 23 Eng.

Feb. 12. *Powell*, Q.C., and *H. D. Green* moved accordingly: There was no evidence of liability on the part of the defendant. The conditions of sale expressly negatived any warranty. There being no express representation, but, on the contrary, an express announcement that the sale was with all faults, there was nothing amounting to a false representation as to the condition of the pigs. The purchaser must be taken to have bought upon his own judgment and observation as to the soundness of the animals he was buying.

H. Matthews, Q.C., and *Bros* showed cause: It being a criminal offence both at common law and under the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 57, to expose animals suffering from a contagious disease in a public market, there was evidence of a representation, to be implied from the fact of sending the pigs to market, that they were not suffering from a contagious disease. The purchaser was entitled to presume that the seller was not committing an offence, and that from their being so sent the seller did not suppose that they were infected. [They cited *Smith v. Green* (1); notes to *Chandelor v. Lopus* (2); *Bedford v. Bagshaw* (3).]

Powell, Q.C., in reply: The cases which show that it is an indictable offence to expose infected persons or animals for sale are all cases in which there was danger of infection to man: *Rex v. Vantandillo* (4); *Rex v. Burnett* (5); [333 *Regina v. Henson* (6)]. [He also cited *Emmerton v. Matthews* (7); *Hill v. Balls* (8); *Gorris v. Scott* (9); *Couch v. Steel* (10); *Jones v. Just* (11)] (12).

Cur. adv. vult.

April 21. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J.: We intimated at the close of the argument the opinion we had formed; but as the circumstances are novel, and it was strongly urged that there was not sufficient evidence of the scienter, we took time as well to reconsider our opinion as to examine more minutely the evidence. We have carefully gone through the judge's notes, and we agree

(1) 1 C. P. D., 92.

(2) 1 Sm. L. C., 7th ed., 173.

(3) 4 H. & N., 538; 29 L. J. (Ex.), 59.

(4) 4 M. & S., 73.

(5) 4 M. & S., 272.

(6) 1 Dears. C. C., 24.

(7) 7 H. & N., 586; 31 L. J. (Ex.), 139.

(8) 2 H. & N., 299; 27 L. J. (Ex.), 45.

(9) Law Rep., 9 Ex., 125.

(10) 3 E. & B., 402; 23 L. J. (Q.B.), 121.

(11) Law Rep., 8 Q. B., 197.

(12) There was considerable argument as to whether there was any evidence to go to the jury of the scienter, but neither the facts nor the argument as to this are given as not material for the purposes of the legal point here reported.

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with the learned judge that there was evidence such as he could not properly have withdrawn from the consideration of the jury. It must, therefore, upon the finding of the jury, be taken as an established fact that the defendant, when he sent the pigs to the market, not only had every reason to believe, but did believe, as the fact was, that although no outward signs of the malady were discovered in the market, the pigs were tainted with the disease, which had carried off several of the herd and which was then prevalent in the district, that disease being one of a highly infectious nature and dangerous to animal life. And the question is whether, under these circumstances, the defendant is responsible to the buyer for his loss, notwithstanding that he made no representation in words as to the condition of the pigs, and notwithstanding that he guarded himself by conditions of sale which stipulated that the buyer was to take them with all faults. We are of opinion that he is liable. It is not necessary on this occasion to enter into the question whether, if the sale had taken place on the defendant's premises, instead of in the market, the 334] maxim "caveat emptor" *would have protected him. We desire to leave this question entirely open. The pigs had been bought in a public market and were there exposed for sale, and this circumstance opens other and wider considerations than necessarily belong to a private sale on the seller's own premises. It is an indictable offence at common law to bring a glandered horse into a public place to the danger of infecting the people there, *Reg. v. Henson* (1); as it is indictable needlessly to expose in a public street a child afflicted with the small-pox, *Rex v. Vantandillo* (2); *Rex v. Burnett* (3); and reasons equally cogent forbid the bringing into a market animals in a known state of disease, which endangers the health of other animals in the market, especially when they are such as are destined for human food. The Contagious Diseases (Animals) Act, 1869, extends and enforces the common law duty. The 57th section enacts, that "If any person exposes in a market, or fair, or other public place where horses or animals are commonly exposed for sale, or exposes for sale in any sale yard, whether public or private, or places in a lair or other place adjacent to or connected with a market or fair, or where horses or animals are commonly placed before exposure for sale, or sends or causes to be carried on a railway or on a canal, river, or other inland navigation, or on a coasting vessel, or carries, leads, or drives, or causes to be car-

(1) 1 Dears. C. C., 24.

(2) 4 M. & S., 73.

(3) 4 M. & S., 272.

ried, led, or driven, on a highway or thoroughfare any horse or animal affected with a contagious or infectious disease, he shall be deemed guilty of an offence against this act, unless he shows to the satisfaction of the justices before whom he is charged that he did not know of the same being so affected, and that he could not with reasonable diligence have obtained such knowledge." Although the act of exposing in a market for sale animals destined for human food does not imply a warranty that they are free from disease, so as to make the seller responsible if they should turn out to be infected, whether he knew of their condition or not: *Emmerton v. Matthews* ('): it does, we think, amount to a representation that as far as he knows they are not so infected. By bringing them into a market from which he knows that infected animals are by law excluded he intends the public to understand *that he believes them to be [335 marketable; and when he does this, with knowledge that they are tainted with a contagious or infectious disease, he is as much guilty of deceit as if he had made the representation in words. Then, does the condition of sale that they are to be taken "with all faults" negative or qualify this representation? We think not. The words of the condition are: "No warranty will be given by the auctioneer with any lot; and as all lots are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any fault or error of description of any lots in the catalogue." There is nothing here which suggests to the buyer that the pigs were the remnant of a diseased herd, many of which had died; nothing inconsistent with the representation implied by the act of bringing them to the market. If this implied representation were put into words, together with the condition, it would be no more in effect than this: "I believe them to be free from infection, but I will not warrant that they are, and the buyer must take all risks." For these reasons we hold that the motion for a nonsuit must be refused, and the judgment be entered for the plaintiff for the amount found by the jury, £66 19s.

Judgment for the plaintiff.

Solicitors for plaintiff: *Abbott & Co.*

Solicitors for defendant: *Richards & Walker.*

(') 7 H. & N., 586; 31 L. J. (Ex.), 139.

This case was reversed by the Court of Appeal (3 Q. B. Div., 150; 6 Central Law Journal, 107), but as the law of the case is not settled in this country or England, it is deemed advisable to report the case in the Queen's Bench.

As to injuries resulting to animals from other diseased animals being allowed to run at large, see 1 Eng. Rep., 16 note; 16 Eng. R., 446 note; 6 Eng. Rep., 603 note.

A complaint stating that defendant sold to plaintiff a specified number of sheep, representing them to be sound when they were not sound, but all, or a part of them, were affected by a disease known as the hoof rot; and, that relying on the defendant's representations as true, the plaintiff turned the sheep into his field with his other sheep, whereby they also became diseased and the pasture injured, does not state several causes of action, but only a single cause of action, with circumstances of special damage, and the averments showing special damage are not redundant or irrelevant matter: *Wilcox v. McCoy*, 21 Ohio St. R., 655.

As to liability in such cases, see *Herrick v. Gary*, 83 Ills., 85; *Peterkin v. Martin*, 30 La. Ann., 894.

As to criminal liability for selling diseased meat, see *People v. Parker*, 83 N. Y., 85; *Selbright v. The State*, 2 West Va., 591; *Goodrich v. People*, 3 Parker, 622, 19 N. Y., 574; *Carroll v. Eivers*, Irish L. R., 7 C. L., 226.

Indictment: 4 Cor's Cr. Cases, Sup. XIV; *Goodrich v. People*, 3 Park., 622.

As to when diseased animals' meat, etc., may be seized by inspector of board of health: *Daly v. Webb*, Irish L. R., 4 C. L., 309; *Underwood v. Green*, 42 N. Y., 140, reversing 3 Rob., 86.

As to liability to one injured by eating unwholesome meat knowingly sold, see *Miller v. Becker*, 2 N. Y., 262; *Crim v. Petrie*, 6 Hill, 522.

In England, the rule seems to be that on a sale of provisions for immediate use there is no implied warranty of soundness: *Emmerton v. Matthews*, 7 Hurl. & Norm., 561, 1 Amer. L. Reg., N.S., 231; *Burnaby v. Bollett*, 16 Mees. & Welsb., 644, 634; *Bigge v. Parkinson*, 7 Hurl. & Norm., 955, 961; *Benj. on Sales* (2d Am. ed.), §§ 670-1; *Add. on Cont.* (6th Eng. ed.), 214; 1 Chitty on Cont. (11th Am. ed.), 635, and note b.

Except, perhaps, in the case of a guest at an inn, when the innkeeper is liable for furnishing his guest with improper food: *Add. on Cont.* (6th Eng. ed.), 214; *Bigge v. Parkinson*, 7 Hurl. & Norm., 961.

In *Indiana* it has been held, there was no implied warranty as to quality or wholesomeness in the sale of molasses by a wholesale dealer: *Humphreys v. Cornline*, 8 Blackf., 516.

So on a sale of tobacco: *McAvoy v. Wright*, 25 Ind., 22.

So of wheat: *Davis v. Murphy*, 14 Ind., 158.

When the purchaser does not select the provisions, but orders those of a particular kind or quality, there is the usual implied warranty that the article furnished shall correspond with that ordered: *Add. on Cont.* (6th Eng. ed.), 214; *Bigge v. Parkinson*, 7 Hurl. & Norm., 961.

In *Massachusetts* it is held, that upon a sale of a live cow by a farmer to retail butchers, there is no implied warranty that she is fit for food, although he knows that they buy her for the purpose of cutting her up into beef for immediate domestic use: *Howard v. Emerson*, 110 Mass., 320.

See also *Emerson v. Brigham*, 10 Mass., 197; *Windsor v. Lombard*, 18 Pick., 57.

In *Michigan*, that when articles of food are bought for domestic consumption, and the vendor sells them for that express purpose, the law implies a warranty that they are fit for such purpose, whether the sale be by a retail dealer or any other person: *Hoover v. Peters*, 18 Mich., 51.

It has been held in New York, by a divided court, that where provisions are sold as merchandise and not for immediate consumption by the purchaser, there is no implied warranty of their soundness: *Moses v. Mead*, 5 Den., 617, affirming 1 Den., 378.

See also *Hargous v. Stone*, 5 N. Y., 85-6; *Hyland v. Sherman*, 2 E. D. Smith, 234; *Goldrich v. Ryan*, 3 id., 324; *Winsor v. Lombard*, 18 Pick., 61; *Story on Sales*, § 373.

Though in the latest case it was held that in all cases of an executed contract of sale of articles of food, when the vendor has personal knowledge of the quality and condition of the articles sold, which are not known to the purchaser, and knows that the purchaser intends to use the articles for food, or to sell them to others to be used for that purpose, the law implies a warranty that the articles are sound,

wholesome, and fit to be used as articles of food. The plaintiffs, who were engaged in buying and packing meat and pork, to be sold at wholesale and retail as an article of food, purchased (through an agent) of defendant the carcass of a hog, at the highest market price for pork to be used as food, and paid therefor. Defendant knew it was to be used as food, and before the sale, in presence of plaintiff's agent, denied that the carcass was that of a boar, although such was the fact. The flesh of a boar is unfit for human food, and is used only for grease or oil, and is worth much less than that fit to be eaten. Held, that there was an implied warranty that the hog was fit to be used for food, and that for a breach thereof plaintiffs could recover the damages sustained: *Burch v. Spencer*, 15 Hun. 504.

On a sale of provisions for immediate use by the purchaser, there is

such a warranty: *Divine v. McCormick*, 50 Barb., 116; *Moses v. Mead*, 1 Den., 378; *Van Bracklin v. Fonda*, 12 Johns. 468; 1 Pars. on Cont. (6th ed.), 588 note; *McNaughton v. Joy*, 1 Weekly Notes Cas. (Penn.), 470.

In *Tennessee* it is held that where a chattel, after inspection by the buyer, is bought for a specific purpose known to the seller, and there is no fraud, the rule of *caveat emptor* strictly applies. There is in such case no implied warranty of fitness, and if the chattel perish or become unfit for use by reason of some latent defect equally unknown to both parties, the buyer must sustain the loss. The rule that the seller is responsible for defects unknown to him, applies only to sales of provisions for consumption, and rests on statutory enactments, and not on the doctrine of implied warranty: *Goad v. Johnson*, 6 Heiskell, 340, 346.

[2 Queen's Bench Division, 339.]

May 8, 1877.

***HOOPER and Another v. BURNE, THE WESTBURY [339
IRON COMPANY, and THE GREAT WESTERN RAILWAY
COMPANY.**

*Lands Clauses Consolidation Act (8 & 9 Vict. c. 18) s. 127—Superfluous Lands—
Lands not in actual Use for purposes of Undertaking.*

Where lands have been taken compulsorily under the powers of a railway act, and retained by the company with the *bona fide* intention of using them for the purposes of the railway, and at the expiration of the period for the sale of superfluous lands, though they are not in actual use, there is a reasonable prospect of their being ultimately required and used for the purposes of the railway, such lands are not superfluous lands within sect. 127 of the Lands Clauses Consolidation Act.

Great Western Ry. Co. v. May (Law Rep., 7 H. L., 283; 10 Eng. Rep. 38) distinguished.

SPECIAL CASE stated in an action of ejectment. The facts and the nature of the arguments sufficiently appear from the judgments.

1877. April 17. *Merewether*, Q.C. (*Kinglake* with him), for the plaintiffs, cited *Great Western Ry. Co. v. May* (¹); *Lord Carrington v. Wycombe Ry. Co.* (²); *City of Glasgow Union Ry. Co. v. Caledonian Ry. Co.* (³).

(¹) Law Rep., 7 H. L., 283; 10 Eng. R., 38.

(²) Law Rep., 3 Ch., 377.

(³) Law Rep., 2 H. L. Sc., 160.

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Thesiger, Q.C. (*C. S. C. Bowen* with him), for the defendants, cited *Bells v. Great Eastern Ry. Co.* (¹); *Great Western Ry. Co. v. Smith* (²); *Stockton & Darlington Ry. Co. v. Brown* (³).

Merewether, Q.C., in reply.

Cur. adv. vult.

May 8. The following judgments were delivered :

MELLOR, J.: This is a special case stated by an arbitrator, with the power for the court to draw inferences of fact.

The action in which this case is stated is an action of ejectment, brought by the plaintiffs to recover three several parcels of land, containing together about thirteen acres, in the parish of Westbury and county of Wilts, alleging them to be superfluous lands under the provisions of the Lands 340] Clauses Consolidation Act (8 & 9 Vict. *c. 18, s. 127), which is incorporated with the local acts referred to in the case, and the question is, whether, or not, the circumstances of the present case and the inferences which ought to be drawn therefrom distinguish it from the judgment and reasoning of the House of Lords in the case of *Great Western Ry. Co. v. May* (⁴). Upon a careful consideration of the facts stated in this case, and drawing reasonable inferences therefrom, I have come to the conclusion that the present case is clearly distinguishable from that of *Great Western Ry. Co. v. May* (⁴), and that our judgment ought to be for the defendants. The land in question was originally acquired under the powers of the Wilts, Somerset and Weymouth Railway, as constituted and amended by the several acts referred to in the case. No notice to treat was ever given to the owners in respect of such lands, but by an agreement of the 1st of March, 1848, made between the trustees of the Rev. John Hooper and Elizabeth his wife and the Wilts, Somerset and Weymouth Railway Company, the land in question, with other land then in two parcels and containing together nineteen acres, with all mines thereunder, were contracted to be sold to the Wilts, Somerset and Weymouth Railway Company for £3,280, which was to be in full satisfaction of all works of accommodation and of all severance or other damage, which said lands were accordingly, on the 28th of March, 1848, duly conveyed unto the said company, their successors and assigns, with a cottage tenement, and out-house erected on one of the said pieces or parcels of land, together with all mines and

(¹) Law Rep., 8 Ex., 294.

(²) 2 Ch. D., 235.

(³) 9 H. L. C., 246.

(⁴) Law Rep., 7 H. L., 283.

minerals thereunder, for the sum agreed upon, which was to be in full satisfaction of all compensation to which they might otherwise have been entitled in respect of severance from other lands of the vendors. Shortly after the completion of the purchase the said company took possession of the lands so conveyed, and upon part thereof, being about six acres, constructed in part the line of railway, station, and other works known as the Westbury station. They also set out and made upon part of the said land a road called the "Station Road" for the purposes of access to the passenger station, which is and always has been since used for the purposes of the said station. They also made a well, in the year *1848, on a portion of the land for sup- [341] plying a tank erected on the premises with water for engine purposes. The said company being then apparently unable to carry out the original purposes of the purchase, but desiring to render the residue of the land productive, let it to a tenant from year to year for agricultural purposes, but subject to the right of the company to resume possession on a two months' notice at any time, whenever it might be required for any purpose connected with the said railway. All this was done by the Somerset, Wilts and Weymouth Railway Company before it was dissolved and the undertaking transferred to the Great Western Railway Company by the act of 1851, as stated in paragraph 5 of the case. Subsequently to the transfer of the said undertaking to the Great Western Railway Company it was found that the well which had been made as before stated, by the Somerset, Wilts and Weymouth Railway Company, gave an insufficient supply of water, and thereupon a reservoir eighty feet long, forty feet wide, and thirteen feet deep, was made on other portion of the land, which was and is supplied with water by the natural drainage of the surrounding lands, and is connected with the well by pipes for the supply of the engines and use for railway purposes. The cottage also was occupied by one of the railway servants. A smithy was erected by the Great Western Railway Company in 1872 for the use of the railway, and on the 18th of August, 1871, the land formerly demised for agricultural purposes was let to the Westbury Iron Company, Limited, together with a license to get the minerals on and under such land, but determinable upon twenty-eight days' notice by the Great Western Railway Company, and it was agreed that the working and removing of the iron ore should be done to the satisfaction of the company's engineer, and that all holes made thereon should be filled up and resoiled as set

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forth in the indenture set out in Appendix E. The said iron company, limited, has been since and is now in the possession of such land under such letting and license. It is further expressly found by the special case that since the year 1868 the traffic at the Westbury station has much increased, and that during that time the said three pieces of land "have been and still are required for the purpose of constructing additional sidings upon them to accommodate the increased traffic." It further appears that although 342] *the want of such additional accommodation has been the subject of much discussion by the district officers of the railway having the supervision of the traffic at that station, owing to financial reasons and the necessity of applying the funds of the company to other works, nothing has as yet been done to supply additional accommodation at the Westbury station. It further appeared that nineteen acres of land so purchased as aforesaid are included in the plans and books of reference deposited with the clerk of the peace for the county of Wilts, and all but seven and a half acres were included within the limits of deviation marked thereon. The time originally limited by the Wilts, Somerset and Weymouth Amendment Act for completion of the works of the railway had been by warrant of the Railway Commissioners, dated the 12th of April, 1848, duly extended to the 3d of August, 1853.

Upon the argument before us it was contended for the plaintiffs that although such land was acquired by voluntary agreement and not under any notice to treat, it was under the circumstances to be considered as land acquired under the compulsory powers of the Wilts, Somerset and Weymouth Railway Company's Act, and that on the expiration of the ten years from the 3d of August, 1853, to which date the time for completing of the works had been so extended, the lands not then used for the purpose of the railway became surplus lands within the meaning of the 127th section of the Lands Clauses Act, and then vested in the plaintiffs as representing the then owners of the adjoining lands, or at least a portion thereof proportional to the extent to which the same abutted on the adjoining lands of the plaintiffs.

Mr. Thesiger, on the part of the defendants, raised no distinction as to portions abutting on the highways, but contended that the lands in question never became superfluous lands within the meaning of s. 127 of the Lands Clauses Act; first, because the dealing with such lands by the Wilts, Somerset, and Weymouth Company, and subsequently by the Great Western Railway Company, was entirely incon-

sistent with such a conclusion. In the second place he contended that inasmuch as no notice to treat had ever been given by the Wilts, Somerset and Weymouth Company to the owners, but the lands had been sold and conveyed by such *owners together with the minerals, [343 it showed that the transaction was not in any sense a compulsory purchase under the special powers of the company. It is not necessary to decide whether or not the latter contention can be maintained, because I am of opinion that upon the facts stated in the present case, and the inferences which ought to be drawn therefrom, the lands in question never did become superfluous lands within the meaning of the 127th section, and never did vest in the plaintiffs. Although not intending to decide upon the merits of Mr. Thesiger's second contention, I am at liberty to refer to the fact that the lands were acquired by agreement, voluntarily made, and were intended for the site of the Westbury station, and that they must in the usual course of things have been purchased under the advice of the defendants' engineer, as lands likely to be actually required for the erecting and completing the accommodation which the traffic in its development might demand within some reasonable time: *Brown v. Stockton and Darlington Co.* (1), referred to by the Lord Chancellor in *City of Glasgow Union Ry. Co. v. Caledonian Ry. Co.* (2), and per Blackburn, J., in *May v. Great Western Ry. Co.* (3): and it is expressly found in the case, that since 1868 the land in question "has been, and still is, required for the purpose of constructing additional sidings upon it to accommodate the increased traffic." The mode in which the lands have been dealt with by digging the well, making the reservoir, erecting the smithy, and the conditions upon which the portions not then actually used were let, are all consistent with the reasonable belief existing that they would in all probability become necessary for the purpose of extending the accommodation at the station in question. It is true that in the case of *May v. Great Western Ry. Co.* (4), it appeared that a portion of the land there decided to be superfluous had been let at rents to the servants of the company or others, and upon similar terms cultivated by them; but it was originally acquired for the temporary purpose only of depositing spoil thereon, and as was said by Lord Hatherley (5): "It had been used for depositing spoil; it has performed its duty," and "was clearly

(1) 9 H. L. C., 246.

(2) Law Rep., 2 H. L. Sc., 160.

(3) Law Rep., 7 Q. B., 382.

(4) Law Rep., 7 Q. B., 364.

(5) Law Rep., 7 H. L., 302.

344] land *which was not required for the purpose of the railway;" and the Lord Chancellor ⁽¹⁾ is reported to have said, "It was used for the temporary purpose, and only for the temporary purpose, of deposition spoil upon it. At the end of the ten years it was found as a plot of ground upon which spoil had been deposited, but upon which spoil had ceased any longer to be deposited; and there it lay, as a piece of ground, useless and unprofitable, having served the purpose for which it was taken, but having no longer, according to the case, any purpose to serve in connection with the railway," and elsewhere, he said ⁽²⁾, "In point of fact, so far as I can understand the statements in this case, it never was acquired by the company, and never was intended by the company to be acquired as to the whole of it for any permanent purpose." It is clear to me from the reasoning of the Lord Chancellor, that if that case had disclosed any facts showing that there were purposes remaining unsatisfied, he would have considered the retention of the land justifiable. The reasoning of all the judges in the Court of Queen's Bench is strong to the same effect. Cockburn, C.J. ⁽³⁾, expressly says, "If looking to the surrounding circumstances of the company, and the present, I will not say immediately present, but still the proximate possibility within reasonable contemplation there shall be reasonable ground to believe that the land in question will become available for the purposes of the undertaking, it is not because there may not have been up to the moment of the expiration of the ten years, or at the actual moment of that expiration, an immediate application of the land to the purposes of the undertaking you are to shut your eyes to the fact that it will certainly become available for such purposes, and I think that under such circumstances it would be perfectly legitimate and proper to say that the land is still required for the purposes of the undertaking, and therefore is not superfluous land within the meaning of the section." Accepting, therefore, most completely the judgment and the reasoning of the Lords in the case of *Great Western Ry. Co. v. May* ⁽⁴⁾, I am entirely satisfied that the decision in that case does not govern the facts of the present, and that the 345] reasons assigned by the Lords who expressed *their opinions therein, when rightly applied to the circumstances of the present case, afford very strong grounds in support of the opinion at which I have arrived that our judgment ought to be for the defendants.

⁽¹⁾ Law Rep., 7 H. L., 297.

⁽²⁾ Law Rep., 7 H. L., 296.

⁽³⁾ Law Rep., 7 Q. B., 379.

⁽⁴⁾ Law Rep., 7 H. L., 288.

MANISTY, J.: This is a special case stated in an action of ejectment brought to recover possession of about thirteen acres of land in the parish of Westbury, in the county of Wilts, the same being part of nineteen acres of land purchased in the month of March, 1848, by the late Wilts, Somerset and Weymouth Railway Company (now merged in and represented by the Great Western Railway Company, who are defendants in the present action), and the question is whether the thirteen acres of land, or any part of it, was superfluous land within s. 127 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), on the 3d of August, 1863.

If any part of the thirteen acres was superfluous land, which ought to have been sold and disposed of as such before the 3d of August, 1863, then it is admitted that the same became vested in the plaintiffs as adjoining owners on that day, and that they are now entitled to recover possession of it.

It was contended on behalf of the plaintiffs, first, that the land in question was acquired by the railway company under the compulsory powers of their special act of 1846; and, secondly, that it was superfluous land within s. 127 of the Lands Clauses Consolidation Act, 1845.

On behalf of the defendants it was contended, first, that the land was acquired by the company under a voluntary agreement, and not under the compulsory powers contained in their special act, in which case s. 127 of the Lands Clauses Consolidation Act would not apply; and, secondly, assuming the land to have been acquired compulsorily, still it was not and never had been superfluous land, within the meaning of s. 127 of the Lands Clauses Consolidation Act.

It was also contended by the plaintiffs, and denied by the defendants, that the case was governed by the judgment of the House of Lords in the *Great Western Ry. Co. v. May* (').

*The court has by consent the same power of drawing inferences as a jury. [346

The inference which I draw from the facts stated and found in the special case is, that no part of the thirteen acres of land sought to be recovered in the present action is now, or ever has been, superfluous land within the meaning of s. 127 of the Lands Clauses Consolidation Act, 1845. I adopt implicitly (as I am bound to do) the law as laid down by the House of Lords in the case of *Great Western Ry. Co. v. May* ('), but the facts in this case differ essentially from the facts in that case. The *ratio decidendi* in *May*'s

(') Law Rep., 7 H. L., 283.

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doubt the length of time which elapsed between the purchase of the land in 1848 and the time (say, 1868) when the land was actually required for the purposes of the railway, coupled with the way in which the company let and dealt with it in the meantime, are facts to be taken into consideration; but they do not, in my mind, outweigh the other facts in the case. I think it must be assumed that the Legislature would not in 1846 have granted the compulsory power to take the nineteen acres of land, without some proof that there was reasonable ground for supposing that it would be required for the purposes of the undertaking. And I think the fact that ever since 1868 it has been, and is still required for those purposes, is a cogent fact in favor of the defendants.

It seems to me that this is a stronger case in favor of the railway company than *Betts v. Great Eastern Ry. Co.* (¹), which was cited in the course of the argument; and in giving judgment for *the defendants, I do not think we shall in any respect decide contrary to *Great Western Ry. Co. v. May* (²).

I abstain from going into the question whether the land was acquired by voluntary agreement or under the compulsory powers of the act of 1846, because I think the defendants are entitled to judgment on the other ground, which I have so fully gone into.

Judgment for the defendants.

Solicitor for plaintiffs: *R. R. Nelson.*

Solicitors for defendants: *Field, Roscoe & Roscoe.*

(¹) Law Rep., 8 Ex., 294.

(²) Law Rep., 7 H. L., 283.

See 10 Eng R., 56 note.

[2 Queen's Bench Division, 355.]

May 11, 1877.

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*WOOLFE V. HORNE and Another.

Auctioneer—Personal Liability—Conditions of Sale—Delay in clearing Goods within prescribed Time—Condition Precedent.

In an action for the non-delivery of goods, it appeared that the defendants, who were auctioneers, issued printed catalogues, headed "Great Western Railway Company. Catalogue of unclaimed property, &c., which will be sold by auction by Messrs. H. & E. (the defendants), on Tuesday, November 7th, and following day. By order of the directors of the above company." &c. The catalogue contained, amongst others, the following conditions: "The lots to be cleared away within three days after the sale at the purchaser's expense, &c. If any deficiency shall arise, or from any cause the auctioneer shall be unable to deliver any lot or portion of a lot, then in such case the purchaser shall accept compensation. Upon failure of

complying with the above conditions, the money deposited in part payment shall be forfeited. All lots unclaimed within the time aforesaid shall be resold by public or private sale without further notice, and the deficiency made good by the defaulter."

The plaintiff attended the sale, received a catalogue, bought one of the lots, and paid a deposit. He did not fetch the goods away on Saturday (the last of the three days for clearing), but went for them on the Monday following, when he was told by one of the defendants that the lot had been delivered to another person. There was evidence that the lot was seen on Saturday morning in the defendants' possession as if ready for delivery, and that it was usual to delay the delivery of large lots like it till the smaller lots had been delivered. The plaintiff having been nonsuited:

Held, first, that on the face of the catalogue and conditions, there was evidence that the defendants contracted personally with the plaintiff for the delivery of the goods purchased by him. Secondly, that the condition as to clearing the lot within three days was not a condition precedent to the plaintiff's right to claim delivery.

THIS was an action in the Mayor's Court of London to recover damages for the non-delivery of goods sold by the defendants to the plaintiff.

At the trial before Mr. Brandon, the registrar, evidence was given that the defendants, Messrs. Horne & Eversfield, were auctioneers, and that they issued printed catalogues of goods to be sold by auction. Each catalogue was headed "Great Western Railway. Annual clearance sale. Catalogue of the left and unclaimed property, &c., &c., which will be sold by auction by Horne, Eversfield & Co., at the Goods Warehouses, Paddington, on Tuesday, November 7th, 1876, and following day, at 11 o'clock precisely each day. By order of the directors of the above company. May be *viewed the day previous. Catalogues had on the [356 premises, and of the auctioneers, 7 Great George Street, &c."

The catalogue also contained conditions of sale, of which the following are material:—

"The lots to be cleared away within three days after the sale, at the purchaser's expense, with all faults and defects, and without any allowance for error in description. If any deficiency shall arise, or from any cause the auctioneers shall be unable to deliver any lot or portion of a lot, then in such case the purchaser shall accept compensation for the same, to be calculated in proportion to the purchase-money for the whole lot.

"Upon failure of complying with the above conditions the money deposited in part payment shall be forfeited; all lots uncleared within the time aforesaid shall be resold by public or private sale without further notice, and the deficiency (if any) attending such resale, together with all charges and expenses attending the same, and arising from the non-removal of the lots within the time specified, shall be made good by the defaulter at this present sale."

The plaintiff, on Wednesday the 8th of November, attended the sale, received a catalogue, and bought lot 542, consist-

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ing of a quantity of rags, at so much per cwt., and paid the deposit. Rags were goods which required weighing, and such goods were not delivered till after the small lots. Being of the Jewish persuasion he did not go on Saturday to fetch the goods, but went on Monday to the warehouse and saw Eversfield, one of the defendants, and said he had come to clear the lot. Eversfield said that the goods had been taken away a day or two before. He gave the plaintiff an order on the foreman for the delivery of the lot, which the foreman was unable to comply with, owing to its removal. A witness said that between ten and eleven on Saturday morning he went to clear goods which he had bought at the sale, and saw lot 542, part of which lay in the warehouse and part was on a trolley; and another witness stated that a servant of the defendants said that he would not deliver any weighed goods until Monday.

It was objected that the defendants were not liable, for they sold as agents for the Great Western Railway Company, and the catalogues disclosed their principals. Secondly, that the contract was to deliver on the purchaser clearing away his goods within three days, and that, as the plaintiff did not present himself or was ready to clear the goods within the three days, there was no breach. Other objections were taken to which it is unnecessary to refer.

The plaintiff was nonsuited, with leave to move to enter the verdict in his favor for £51 2s. 16d.

An order having been obtained calling on the defendants to show cause why the nonsuit should not be set aside and a verdict entered for the plaintiff for £5 12s. 6d., on the ground that there was sufficient evidence to support the plaintiff's case, and that there was nothing in the conditions of sale to prevent the plaintiff's recovering in the action,

A. Cock showed cause: The nonsuit was right. *Hanson v. Roberdeau* (*) decides that an auctioneer, who sells a commodity without saying on whose behalf he sells it, may be personally liable on the contract of sale, but Lord Kenyon expressly states that where the auctioneer names his principal, he is not liable. *Franklyn v. Lamond* (*) is in accordance with this decision, for there it was held that upon a sale of shares by auction, without disclosing the name of the principal, the mere fact that the defendants were described in the catalogue as "auctioneers" was not such an indication of agency as to free them from liability. *Evans v. Evans* (*) is directly in favor of the defendants.

(*) Peake, N. P. C., 163.

(*) 4 C. B., 637; 16 L. J. (C.P.), 221.

(*) 3 Ad. & E., 182.

There there was a letting by auction of premises "subject to the following conditions. By Messrs. Evans & Thomas, auctioneers. (2.) The rent is to be paid into the hands of J. Evans or J. Thomas, auctioneers, or to their order"; and at the bottom of the conditions was written, "Approved of the above conditions by me, D. Jones." It was held that these conditions imported a letting by Jones, Evans & Thomas acting as his agents. In one of the latest cases, *Mainprize v. Westley* (*) where the auctioneer advertised premises for sale by auction by W. (the auctioneer) "by *direction [358 of the mortgagee, with a power of sale," &c. "For further particulars apply to Mr. H., solicitor, or to the auctioneer," it was again held that there was no personal contract by the auctioneer that the premises should be knocked down to the highest bidder, and that the contract, if any, was with H. The words in the catalogue in the present case, "by order of the directors of the above company," the catalogue being already headed "Great Western Railway," are a sufficient disclosure of the defendants' principals.

[FIELD, J., referred to the later case of *Fisher v. Marsh* (*), where the auctioneer was held entitled to sue, and where it is laid down that even where the principal is known, a contract in writing may be made by an agent with a third person on such terms that the agent is personally bound to fulfil it.]

Secondly, the plaintiff did not comply with the conditions by claiming the lot within the prescribed time, and has forfeited his right to it. Money paid upon a condition which has not been complied with cannot be recovered back: *Hardingham v. Allen* (*).

Willey Wright, in support of the rule: *Evans v. Evans* (*) is distinguishable. There, the principal affixed his name to the contract, as one of the contracting parties. Here, the dealing was exclusively with the defendants. Secondly, the non-compliance with the conditions of sale as to clearing the goods did not affect the plaintiff's right of action. In *Saint v. Pilley* (*), where there was a similar clause as to the removal, within a particular time, of fixtures sold by auction, it was held that the purchaser did not lose his title to them by allowing them to remain over the time on the premises, during his negotiations for a lease.

MELLOR, J.: I am of opinion that the verdict must be entered for the plaintiff. The general doctrine with regard

(*) 6 B. & S., 420; 34 L. J. (Q.B.), 229.

(*) 3 Ad. & E., 182.

(*) 6 B. & S., 411; 34 L. J. (Q.B.), 177.

(*) Law Rep., 10 Ex., 187.

(*) 5 C. B., 793.

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to the authority of auctioneers is laid down in the case of *Williams v. Millington* (') by Lord Loughborough, who says: "An auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare [359] custody, like a servant or shopman. There is *no difference whether the sale be on the premises of the owner, or in a public auction room, for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him, with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay." Now, it was conceded by the counsel for the defendants that an auctioneer is entitled to sue for the price of goods which he has put up to auction; but it was contended that an auctioneer is no more a contracting party and no more liable to be sued than a broker or any other kind of agent. But, having regard to the general doctrine which I have stated, and to the conditions of sale by which the auctioneer undertakes to deliver the goods, and particularly to the condition by which, in case the auctioneers are unable to deliver any lot, the purchaser is to accept compensation, I think that in the present case the auctioneer is responsible for his neglect to deliver.

Then it was contended that the plaintiff had not complied with the conditions of sale as to the removal of his lot within three days, and that he had, therefore, no right of action. My answer to this objection is that these stipulations cannot be looked upon as conditions precedent. I cannot think that the mere fact that the purchaser did not present himself till Monday morning deprived him of the right to claim his goods. I think, therefore, the action was properly brought against the auctioneers, and that the conditions afford them no defence.

FIELD, J.: I am of the same opinion. The action is brought by the plaintiff against the defendants upon an alleged contract that, if he would buy certain goods from them and pay a deposit, they would deliver the goods to him. At the trial these facts were proved: The defendants acted as auctioneers for the Great Western Railway Company in the sale of goods left with the company by travellers and never claimed. The plaintiff went to the sale and bought a lot of rags, which are heavy goods and required weighing. He paid the deposit according to the terms of a

(') 1 H. Bl., 81, at pp. 84, 85.

catalogue by which the sale was made. By one of the conditions of this catalogue every lot was to be cleared [360 away within three days after the sale, and upon failure of complying with the above condition the deposit was to be forfeited and the lot resold by public or private sale. The plaintiff says, that being of the Jewish persuasion, he did not go on the Saturday, the last of the three days, but went on the Monday. When he got to the warehouse he found that on the previous Saturday his lot had been delivered to some one else and another lot substituted, and the goods were never, in fact, delivered to him. It seems that on the Saturday morning part of the goods were seen upon the warehouse and part on a trolley. Now, was there evidence to go to the jury in support of the plaintiff's case? For if there was, the nonsuit was wrong. In the first place, the fact that the goods were seen on the trolley was evidence that they were then ready for delivery. Another witness stated that the defendants' servant said that he would not deliver any weighed goods till Monday. The question whether the defendants entered into a contract to deliver is a question of fact. We have, first, the fact that the defendants are auctioneers. It has been argued that auctioneers are merely in the position of brokers or agents. This may or may not be the case, according to circumstances. It must be remembered that, according to *Williams v Millington* (') auctioneers have much larger rights than ordinary agents. The actual delivery of the goods is intrusted to them; they have a lien upon the goods for the charges, and their possession of the goods is complete till delivery. Now, assuming the defendants could have sued the plaintiff for the price of these goods, had not the plaintiff a correlative right to sue them for the non-delivery? The goods, it is clear, could not have been delivered without an order from the defendants, and I think that there is abundant evidence that they were the persons who made the contract.

Secondly, it was argued that punctuality in clearing the goods was a condition precedent to the right to claim delivery. But to make these stipulations conditions precedent, it is necessary that they should go to the whole root of the consideration. I do not think that they go so far. If the goods were to have been cleared before 12 o'clock on Saturday, it never could be supposed that *the plaintiff [361 would lose his right to them by coming half an hour too late. No doubt there is an implied agreement, for the breach of

(') 1 H. Bl., 81.

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which the purchaser is liable, but it is not a condition precedent.

Order absolute.

Solicitor for plaintiff: *H. W. Cattlin.*

Solicitors for defendants: *Farlow & Jackson.*

[2 Queen's Bench Division, 361.]

May 11, 1877.

**KARET V. THE KOSHER MEAT SUPPLY ASSOCIATION,
Limited.**

Bills of Sale Acts (17 & 18 Vict. c. 36) (29 & 30 Vict. c. 96), s. 4—Renewal of Registration of Bill of Sale—Assignment by Grantee of Interest under Bill of Sale.

The act 29 & 30 Vict. c. 96, s. 4—which requires the registration of a bill of sale under 17 & 18 Vict. c. 36 to be renewed every five years, in default of which the registration ceases to have any effect—is equally imperative when the grantee, before the period for renewal, assigns his interest under the bill of sale to a third person; and the assignee, if the registration is not renewed, has no title as against an execution creditor.

1. CASE stated for the opinion of the court pursuant to an interpleader order.

2. On the 19th of January, 1871, G. Brown, for valuable consideration, made a bill of sale in favor of G. Marks of household furniture, stock-in-trade, fixtures, fittings, and utensils in trade, goods, chattels, and other effects more particularly specified in the schedule to the bill of sale.

3. The provisions of the act 17 & 18 Vict. c. 36⁽¹⁾, as to 362] *registration, were duly complied with as to the bill

(1) 17 & 18 Vict. c. 36, s. 1: "Every bill of sale of personal chattels made after the passing of this act—shall, together with an affidavit, &c., of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, &c., be filed with the officer acting as clerk of the docketts and judgments in the Court of Queen's Bench within twenty-one days after the making or giving of such bill of sale,—otherwise such bill of sale shall, as against all assignees in bankruptcy of the person whose goods are comprised in the bill of sale, and as against all sheriff's officers seizing the property in execution, be null and void to all intents and purposes whatsoever," &c.

By 29 & 30 Vict. c. 96, s. 4, the registration of a bill of sale under the principal act (17 & 18 Vict. c. 36) shall,

during the subsistence of such security, be renewed in manner hereinafter mentioned once in every period of five years, commencing from the day of the registration, and if not so renewed such registration shall cease to be of any effect at the expiration of any period of five years during which a renewal has not been made as hereby required—

By s. 5, the registration of a bill of sale shall be renewed by some person filing in the office of the Masters of the Court of Queen's Bench (being the officers acting as clerk of the docketts and judgments in the said court) an affidavit stating the date of such bill of sale, and the names, residences, and occupations of the respective parties thereto as stated therein, and also the date of the registration of such bill of sale, and that such bill of sale is still a subsisting security, &c.

of sale, and were so complied with within twenty-one days of the making or giving thereof, but the registration thereof has not since been renewed.

4. On the 10th of February, 1875, an indenture was duly, and for valuable consideration, made between Marks and the plaintiff A. Karet, whereby it was witnessed that Marks assigned unto Karet the household furniture, stock-in-trade, fixtures, fittings, and utensils in trade, goods, chattels, and effects comprised and described in the schedule to the bill of sale above-mentioned, and all the estate and interest of Marks therein or thereto.

5. The indenture of the 10th of February, 1875, was never registered.

6. On the 1st of May, 1876, the above-named defendants obtained and signed judgment in this court against Brown for £35 12s.

7. On or about the 30th of May, 1876, the household furniture, stock-in-trade, fixtures, fittings, and utensils in trade, goods, chattels, and effects comprised and described in the schedule to the bill of sale above-mentioned, or some portion thereof, were seized by the sheriff of Middlesex under a *fi. fa.* issued upon the judgment for the levy of £35 12s., and the usual charges and expenses.

8. The plaintiff, on the 1st of June, 1876, sent a notice to the sheriff claiming the whole of the goods, chattels, and effects so seized as aforesaid.

9. The whole of the goods so seized were at the time of the seizure in the actual and apparent possession of Brown.

10. The goods described and comprised in the schedule to the bill of sale were, at the time of the making of [363 the indenture of the 10th of February, 1875, and have been ever since until and at the time of the seizure, in the actual and apparent possession of Brown.

12. Upon the making of the interpleader order the sheriff withdrew from possession. Brown has subsequently become bankrupt, and the defendant company is being wound up pursuant to the provisions of the Companies Acts, 1862 and 1867.

The question for the opinion of the court is whether, at the time of seizure by the sheriff as above stated, the household furniture, stock-in-trade, fixtures, fittings, utensils in trade, goods, chattels, and effects comprised and described in the schedule to the bill of sale were the property of the plaintiff as against the defendants.

Dodd, for the plaintiff: No authority upon the present question can be found; but it will be conceded that the

assignment was valid at the time when it was made, and there are no express words in the act, 29 & 30 Vict. c. 96, which require the assignee of a bill of sale to register the assignment, and he ought not to be required to renew the registration of the making of the bill of sale, a transaction to which he was no party.

[FIELD, J.: The object of the act is that creditors may know whether their debtor has parted with his goods. It is nothing to them whether the grantee has or has not assigned his interest under the bill of sale.]

In Benjamin on the Contract of Sale, 2d ed., p. 396, the learned author, after referring to 29 & 30 Vict. 96, says: "Neither the statute of Elizabeth nor the Bills of Sale Act renders the contract void between the parties. Even as to creditors such conveyances are not void, but voidable, and the creditors must, as in all analogous cases, elect whether they will treat their debtors' conveyance as valid or defeasible. It the transferee makes a conveyance to a third person *bona fide*, for a valuable consideration, before the bill of sale is impeached by creditors as being in fraud of their rights, the title of such third person will not be disturbed." *Morewood v. South Yorkshire Ry. Co.* (') shows 364] that although a bill of sale as *between the grantor and grantee is a fraud on the grantor's creditors, yet, if the grantee, with the sanction of the grantor, assign his interest in the goods to another for good consideration and *bona fide*, the assignment is valid as against the creditors. The principle is that it is too late to avoid a voidable transaction, when a third person has *bona fide* acquired an interest under it.

Horne Payne, for the defendants: The construction which it is proposed to put upon 29 & 30 Vict. c. 96, would defeat the operation of the enactment.

[MELLOR, J.: It must be contended that in a case where the grantee does not register within twenty days of the bill of sale, the law not compelling him to register within that time, and then assigns his interest within the twenty days, that no registration whatever is required.]

The passage in Benjamin on Sales has no application, for it refers only to transactions voidable on the ground of fraud. The assignee claims the goods under the original bill of sale, and must be taken to have notice of all that is required to make it valid.

MELLOR, J.: I think that our judgment must be for the defendants, on the ground that the facts bring the case

(') 3 H. & N., 798; 28 L. J. (Ex.), 114,

within the mischief intended to be prevented by the Bills of Sale Act. The preamble of the act, 17 & 18 Vict. c. 36, recites "that frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors." Sect. 1 then requires that to make a bill of sale operative it shall be registered in a particular manner within twenty-one days after it is made, in order that all persons who give credit to the grantee may have the opportunity of knowing that he has conveyed away his property. The present case, so far as I am aware, has not occurred before. It seems that Brown made a bill of sale of his furniture to Marks, that the bill of sale was duly registered before the twenty-one days, and that four years afterwards Marks assigned his interest to the plaintiff. The act, *29 & 30 Vict. c. 96, s. 4, requires the registration of a bill of sale under 17 & 18 Vict. c. 36, to be renewed once in every five years. In the present case the five years have elapsed without the registration being renewed. The grantor always remained in possession of the goods, and there is nothing to take the case out of the statute, except the fact that the grantee had executed an assignment of his interest, and that the act does not in terms require the assignee to register. But I cannot think that this is of the slightest consequence. To adopt the plaintiff's construction would entirely get rid of the provisions of the statute, for where, as here, the grantee made an assignment, the grantor would go on obtaining credit, and his creditors would have no protection. [365

FIELD, J.: I am of the same opinion. The Bills of Sale act, 17 & 18 Vict. c. 36, whether wisely or not is not for us to say, enacts that every grantor of a bill of sale shall give notice to all the world, by means of registration, that he has parted with his goods to some other person, and that the goods which are in his possession have practically ceased to belong to him. It is therefore enacted that every bill of sale which does not give this information shall, as against the grantor's execution creditors, be void. In the present case the question is whether certain goods which were in the possession of the grantor are the property of the plaintiff. Originally the registration required by the Bills of Sale Act was available for all time, but by 29 & 30 Vict. c. 96, s. 4, it ceases to have any effect after five years. But it is argued

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that inasmuch as the grantee of the bill of sale has *bona fide* conveyed his interest to a third person, the defect in the registration is immaterial. As a general proposition, any one acquiring the possession of goods cannot have a better title than the person who grants to him. Is the present case an exception? I think to hold that it is would go far towards repealing the act of Parliament. Mr. Dodd has founded an argument upon a supposed analogy between the statute 13 Eliz. c. 5, and the present act, and contends that a transaction voidable between the original parties cannot be avoided after there has been a *bona fide* conveyance for value to a 366] third person. The two cases are quite *different. In the case supposed the *bona fide* assignee has no notice of the fraud. Here the plaintiff became assignee with full notice that unless the registration was renewed after five years, it would be of no effect.

Judgment for the defendants.

Solicitors for plaintiff: *Chapman & Lee.*

Solicitors for defendants: *Harris & Godwin.*

By statute, in most of the states, a renewal of chattel mortgages is necessary in order to preserve the lien thereof.

The statute of New York (Laws 1888, ch. 279, § 3, 4 Edm. St., 435; as amended in 1873, p. 787) provides: "§ 3. Every mortgage filed in pursuance of this act, shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof; unless within thirty days next preceding the expiration of each and every term of one year after the filing of such mortgage, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall be again filed in the office of the clerk or register aforesaid, of the town or city where the mortgagor shall then reside."

In an action by a mortgagee of chattels to recover the value of a part of the mortgaged property wrongfully taken from the possession of the mortgagor, it is not necessary to allege in the complaint that the mortgage was duly filed in the clerk's office of the town where the mortgagor resided when it was given.

The provisions of the Revised Statutes respecting the filing of chattel mortgages, are for the protection of the creditors of the mortgagor, and purchasers in good faith, and not for the benefit of wrongdoers: *Moses v. Walker*, 2 Hilton, 536.

The provisions of the act in reference to chattel mortgages (chap. 279, Laws of 1888), declaring them void as against creditors when not filed, and when not accompanied by immediate delivery and followed by actual and continued change of possession, and the provision of the Revised Statutes (2 R. S., 136, § 5), declaring sales or mortgages of chattels to be presumptively fraudulent when not accompanied by delivery and followed by change of possession, have no application to leases of real estate; and an omission to file any instrument transferring a lease as security, or a failure of the transferee to take possession of the lease or of the demised premises, does not render the transfer void as to creditors or raise a presumption of fraudulent intent: *Booth v. Kehoe*, 71 N. Y., 341.

See *Wisner v. Ocumpaugh*, 71 N. Y., 113; *McCaffrey v. Woodin*, 65 N. Y., 450.

A copy of the mortgage and statement of renewal must be filed, not-

withstanding the mortgage has become absolute by its terms, unless possession has been taken under it: *Ely v. Carnley*, 19 N. Y., 496, affirming 8 E. D. Smith, 489; *Porter v. Parmley*, 52 N. Y., 185, 14 Abb., N.S., 17, reversing 84 N. Y. Superior Court R., 398, 49 How. Pr. R., 445, 18 Abb. Pr., N.S., 104; *Thompson v. Van Vechten*, 5 Abb. Pr., 459, 476; *Fuller v. Acker*, 1 Hill, 478.

Simple contract creditors whose debts accrue while a chattel mortgage is invalid by reason of a failure to file it, and assignees of such creditors, are protected by the statute, though they cannot enforce their rights until judgment: *Southard v. Benner*, 72 N. Y., 224; *Thompson v. Van Vechten*, 5 Abb. Pr., 458, on appeal, 6 Bosw., 373, 27 N. Y., 568; *Stewart v. Beale*, 7 Hun, 405, 68 N. Y., 629; *Fraser v. Gilbert*, 11 Hun, 637; *Parshall v. Eggert*, 54 N. Y., 18.

See *Rinckey v. Stryker*, 26 How., 75, 28 N. Y., 45, 31 N. Y., 140.

Though until such creditor at large has attached the property, or otherwise procured a legal lien thereon, he is not in a position to object to a want of filing of the mortgage: *Lane v. Lutz*, 3 Abb. App. Dec., 19, 1 Keyes, 203; *Stewart v. Beale*, 7 Hun, 405; *Southard v. Benner*, 72 N. Y., 424.

A creditor who knows of the existence of a chattel mortgage, not properly renewed, is not precluded from insisting it is void as against him, and it is so void: *Farmers, etc., v. Hendrickson*, 25 Barb., 484; *Tyler v. Strang*, 21 id., 198; *Thompson v. Van Vechten*, 27 N. Y., 568.

Where a chattel mortgage is not filed, until after the delivery of an execution to the sheriff, it is void as against the latter, although actually filed before a levy has been made: *Hale v. Sweet*, 40 N. Y., 97; *Martin v. McDougall*, 10 U. C. Q. B., 399; *Carscallen v. Moodie*, 15 id., 92; *Stewart v. Beale*, 7 Hun, 405, 68 N. Y., 429.

See *Stewart v. Beale*, 7 Hun, 405.

An assignee for the benefit of creditors is not a *bona fide* purchaser, and cannot impeach it for want of registry: *Van Heusen v. Radcliff*, 17 N. Y., 580; *Schiefflin v. Hawkins*, 1 Daly, 294.

So a receiver: *Gardner v. Smith*, 29 Barb., 68.

Only creditors, purchasers, and mortgagees may raise the objection: *Hayman v. Jones*, 7 Hun, 238.

The omission to refile a chattel mortgage pursuant to the act of 1883, does not render it invalid as against purchasers or mortgagees intermediate the original filing and the omission to refile. The term "*subsequent*," means after the time for refiling has elapsed: *Meech v. Patchin*, 14 N. Y., 71; *Latimer v. Wheeler*, 30 Barb., 485, 3 Abb. Ct. App. Dec., 485; *Farmers, etc., v. Hendrickson, etc.*, 25 Barbour, 484; *Thompson v. Van Vechten*, 6 Bosw., 373, 27 N. Y., 568; *Manning v. Monaghan*, 28 N. Y., 539; *Wiles v. Clapp*, 41 Barb., 645; *Wray v. Fredderke*, 43 N. Y. Superior Court Rep., 335.

One who takes a second mortgage to secure a precedent debt, is not a *bona fide* purchaser within the statute: *Thompson v. Van Vechten*, 27 N. Y., 568; *Delancey v. Stearns*, 66 N. Y., 157; *Wiles v. Clapp*, 41 Barb., 645; *Tiffany v. Warren*, 37 Barb., 571, 24 How. Pr., 293; *Fraser v. Gilbert*, 11 Hun, 637; *Wray v. Fredderke*, 43 N. Y. Superior Court Rep., 335.

So a second chattel mortgagee, after the expiration of a year from the original filing, with notice of the first mortgage, cannot successfully claim that his mortgage is valid as against the first mortgage: *Gregory v. Thomas*, 20 Wendell, 17.

Unless the mortgage be properly renewed, a *bona fide* purchaser from a vendee of the mortgagor, his executor, and in certain cases his widow, after the expiration of one year from the original filing, is protected: *Fox v. Burns*, 12 Barb., 677.

See *Wiles v. Clapp*, 41 Barb., 645; *Manning v. Monaghan*, 1 Bosw., 459, 23 N. Y., 539; *Wooster v. Sherwood*, 25 N. Y., 279.

The omission to file or refile a chattel mortgage, as prescribed by the statute, does not affect its validity as against a subsequent mortgagee or purchaser with notice thereof: *Hill v. Beebe*, 18 N. Y., 556; *Lewis v. Palmer*, 28 N. Y., 271; *Sanger v. Eastwood*, 19 Wend., 514; *Gregory v. Thomas*, 20 Wend., 17; *Tiffany v. Warren*, 37 Barb., 571, 24 How. Prac., 293; *Day v. Munson*, 14 Ohio St. R., 488.

In *Ohio*, it is held that *constructive* notice alone is not sufficient to constitute *mala fides*: *Day v. Munson*, 14 Ohio St. R., 488.

So in *New York*: *Gildersleeve v.*

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Landon, 4 N. Y. Weekly Dig., 411, not reported in Hun.

One who has unlawfully converted the mortgaged property, and has acquired title by payment of a judgment for the value of the property obtained against him by the mortgagor, or his assignee, because of the conversion, is not a *bona fide* purchaser within the meaning of the statute: *Marsden v. Cornell*, 62 N. Y., 215, affirming 2 Hun, 449, 5 T. & C., 27.

But where, prior to the recovery of such judgment, there has been a default in payment as required by the condition of the mortgage, and thereby the mortgagee has become the absolute owner, subject only to the right of redemption, and has the right to immediate possession, so that he, as well as the mortgagor or his assigns, could have maintained an action for the conversion, satisfaction of a judgment for the full value in favor of the latter transfers to the judgment debtor the title of both, and an action to recover possession cannot be maintained against him by the mortgagee: *Marsden v. Cornell*, 62 N. Y., 215, affirming 5 Thompson & Cooke, 27, 2 Hun, 449.

To protect himself against a subsequent purchaser of the mortgaged property, the mortgagee must pursue the statute respecting the filing of his mortgage, literally.

Thus, where the mortgagor resided in the town of Antwerp, Jefferson county, and bought a farm and stock thereon, in the town of Wilna, in that county, and gave a mortgage on the stock, and a few days after moved his residence to the farm, and the mortgage was filed in the latter town: Held that it was void as against a subsequent *bona fide* purchaser: *Powers v. Freeman*, 2 Lansing, 127; *Hicks v. Williams*, 17 Barb., 523.

If, before the year from the original filing expires, the mortgagee takes actual possession of the mortgaged property and retains such a continuous possession, his lien is good notwithstanding a failure to refile: *Otis v. Sill*, 8 Barb., 102, 108-110.

Under the statute, as originally enacted in 1833, it was held that, if a chattel mortgage was properly renewed before the expiration of the first year after its original filing, it continued valid as a continuing security, though

not renewed before the expiration of the second year: *Newell v. Warren*, 44 N. Y., 244; *Manning v. Monaghan*, 10 Bosw., 231; *Wiser v. O'Brien*, 44 How. Prac., 209, 85 N. Y. Superior Court Rep., 149.

See, however, *Marsden v. Cornell*, 62 N. Y., 215.

In 1873 (p. 767) the statute was, however, amended, as above given, so as to require a renewal within "thirty days next preceding the expiration of each and every term of one year after the filing of such mortgage."

A mortgagee must, in Upper Canada, refile from year to year: *Kissock v. Jarvis*, 9 U. C. Com. Pl., 156.

The original mortgage may be refiled with a proper statement of the amount due: *Stockham v. Allard*, 2 Hun, 67; *Rehak v. Wilcox*, 4 Cincinnati Weekly Law Bulletin, 79.

A renewal understating the amount due is good for the amount stated to be due: *Beers v. Waterbury*, 8 Bosw., 397.

A clerical error in the copy of a chattel mortgage and the accompanying statement of the amount claimed, by which such amount is overstated \$100, is fatal, and its validity against creditors ceases with the year after the filing of an accurate copy: *Ely v. Carnley*, 19 N. Y., 496, affirming 8 E. D. Smith, 439.

See also *Frost v. Warren*, 42 N. Y., 204; *Marsden v. Cornell*, 62 N. Y., 219; *Beers v. Waterbury*, 8 Bosw., 396.

If the statement is made in good faith, with reasonable care, and is substantially correct and accurate, the mortgagee should be held to have complied with the spirit and intent of the statute.

A statement in these words: "The above is a true copy of a chattel mortgage on file at A., on which the whole or nearly the whole amount is unpaid and due April 1, 1870," is sufficiently definite where only \$2 has been paid upon a mortgage for \$585 and interest: *Patterson v. Gillies*, 64 Barb., 563; *Walker v. Niles*, 18 Grant's U. C. Chy., 210.

See also *Dane v. Mallory*, 16 Barb., 46; *Barber v. Manghan*, 42 U. C. Q. B., 134; *O'Halloran v. Sills*, 13 U. C. Com. Pl., 465; *Reynolds v. Williamson*, 25 U. C. Com. Pl., 49.

The refileing of a copy of the mortgage, without a proper statement of the

amount due, will not retain the lien of a chattel mortgage as against subsequent *bona fide* purchasers, etc., nor can it be regarded as an original filing: *Marsden v. Cornell*, 62 N. Y., 215, affirming 2 Hun., 449, 5 T. & C., 27; *Fitch v. Humphrey*, 1 Denio, 163.

Where the mortgagee, within thirty days prior to the expiration of a year from the time of filing, procured an indorsement of the words "refiled and renewed" with the date to be made thereon and signed by the clerk, held not to be a sufficient "statement of the interest of the mortgagee in the property" within the statute, and that after the expiration of the year the mortgage became invalid as against creditors of the mortgagor: *Fitch v. Humphrey*, 1 Denio, 163; *Theriot v. Prince*, 1 Edmonds' Rep., 219; *Reynolds v. Williamson*, 25 U. C. Com. Pl., 49; *O'Halloran v. Sills*, 12 U. C. Com. Pl., 465, as explained in *Barber v. Manghan*, 42 U. C. Q. B., 134.

Chattel mortgages are merely filed, and an entry made in a book kept by the clerk, of the names of the parties, the amount secured, the date, time of filing, and when due. This cannot be regarded, in any proper sense, as recording a mortgage: *Vail v. Knapp*, 49 Barb., 300.

If the mortgage or renewal be taken to the clerk's office and there left with the clerk, that is a sufficient filing. The omission of the clerk to properly file, enter and index it does not prejudice the mortgagee.

Colorado: *Eldred v. Maloy*, 2 Colorado, 20.

England: *Combes v. Inwood*, *Hutton (Eng.)*, 1.

Indiana: *Holman v. Doran*, 56 Ind., 358.

Massachusetts: *Fuller v. Cunningham*, 105 Mass., 442; *Wood v. Simons*, 110 Mass., 116.

New York: *Dikeman v. Puckhafer*, 1 Abb. Pr., N.S., 82, 1 Daly, 489.

Vermont: *Fairbanks v. Davis*, 50 Verm., 251.

See *International, etc., v. Seales*, 27 Wisc., 640, where required to be recorded as well as filed, and it was not recorded at length.

See also *Holman v. Doran*, 56 Ind., 358, *Fairbanks v. Davis*, 50 Verm., 251.

"Where, the office of town clerk

being vacant, a person who had charge of the office received a chattel mortgage, brought to the office to be filed, indorsed it 'Filed Oct. 20, 1845,' and placed it among the chattel mortgages in the office; held, that it was a valid filing of the mortgage, within the meaning of the statute": *Bishop v. Cook*, 18 Barb., 326; *Dodge v. Potter*, 18 Barb., 193.

Though, unless the clerk waives immediate payment of his fees, it may be doubted whether he is not obliged to pay or tender the fees for filing: *People v. Hoyt*, 66 N. Y., 606, reversing 7 Hun., 39.

If the mortgage or renewal be delivered to the clerk elsewhere than at his office, it seems it takes effect only from his properly depositing it there: *Hathaway v. Howell*, 54 N. Y. 97.

The provisions of the statute requiring the filing of a copy of a chattel mortgage and statement, etc., within thirty days of the expiration of a year from the filing of the original mortgage, in the office of the town where the mortgagor then resides, cannot be complied with when the mortgagor has become a non-resident of the state within the year, and a *bona fide* purchaser of such chattels after the expiration of the year acquires a title superior to the lien of the mortgage: *Dillingham v. Bolt*, 87 N. Y., 198, 4 Abb. Pr., N.S., 221, reversing 35 Barb., 38.

See Laws 1883, chap. 279, § 2.

For a case where the territory on which mortgagor resided was annexed to another town, etc., and where the mortgage should be filed, see *Curtis v. McDougal*, 26 Ohio St. R. 66.

The refile of a chattel mortgage and statement does not operate as an extension of credit or give the mortgagor any additional right of possession: *Fuller v. Acker*, 1 Hill, 473.

It seems to have been held that refile after the year has expired is good as against a subsequent levy by a creditor, or a subsequent purchaser or mortgagee: *Swift v. Hart*, 12 Barb., 531.

But see *Marsden v. Cornell*, 62 N. Y., 215, 5 Thomp. & Cooke, 27, 2 Hun, 449. Such refile has been so held valid in Ohio: *Relak v. Wilcox*, 4 Cincinnati Weekly Law Bulletin, 79.

In New York, by statute, chattel

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mortgages upon canal boats are required to be filed in the office of the auditor of the canal department, and renewed as if filed in the town clerk's office: Laws 1864, ch. 413, p. 993.

See *Sweet v. Lawrence*, 35 Barb., 337; *Dillingham v. Ladue*, 37 N. Y., 198, reversing 35 Barb., 38.

Under this statute, unless the mortgage be properly renewed by filing copy and statement in the auditor's office, it ceases to be valid as against a subsequent *bona fide* purchaser: *Marsden v. Cornell*, 63 N. Y., 215, 2 Hun, 449, 5 T. & C., 27.

Though so filed, a lien for repairs on the boat is superior to the lien of the mortgage: *Scott v. Deahunt*, 65 N. Y., 128.

By a statute of the United States (U. S. R. S., § 4192, 9 U. S. Stat. at Large, 440) it is provided that "no bill of sale, mortgage, hypothecation, conveyance of any vessel, or part of any vessel, of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled." The section excepts liens by bottomry created during a voyage.

In New York the statute provides that such record may be proved by a certified copy thereof: Laws 1862, p. 450.

It seems a charterparty is not a conveyance of the vessel within the statute: *Mott v. Ruckman*, 3 Blatchf., 71; *Conn. v. Steamer Golden Gate*, Newb. Adm., 308.

This statute, if complied with, makes the lien valid, although the steps required by a state statute to render a chattel mortgage valid be not complied with: *White's Bank v. Smith*, 7 Wall., 646, 37 How. Pr. Rep., 168; *Aldrich v. Atna*, etc., 8 Wall., 491, reversing 26 N. Y., 92; *Folger v. Weber*, 16 Hun, 512.

These decisions by the United States courts to this extent overrule *Thompson v. Van Vechten*, 5 Abb. Pr., 458; *Atna Ins. Co. v. Aldrich*, 26 N. Y., 92.

A mortgage on a vessel is void as against subsequent purchasers, etc., unless so recorded or the purchaser had notice thereof: *Parker Mills v. Jacot*, 8 Bosw., 161.

The home port of the vessel is the port in the office of whose collector a bill of sale, mortgage, etc., should be recorded; not the port of last registry or enrolment when not such home port: *White's Bank v. Smith*, 7 Wall., 646, 37 How. Pr. Rep., 168; *Johnson v. Merrill*, 123 Mass., 153; *Blanchard v. Brig Martha Washington*, 1 Clifford, 168.

See *The Martha Washington*, 3 Ware, 245; *Hays v. Pacific*, etc., 17 How. U. S. R., 596, 598.

The cases in the United States courts, to this extent overrule *Potter v. Irish*, 10 Gray, 416, and *Chadwick v. Baker*, 54 Maine, 9.

If, upon the sale of a vessel, no new register or enrolment, such as is required by the acts of Congress of December 31, 1792, and Feb'y 18, 1793, is taken out or applied for, she ceases to be a vessel of the United States, and a subsequent mortgage of her acquires no validity by being recorded according to the act of Congress: *Johnson v. Merrill*, 123 Mass., 153.

Whether the statute applies to canal boats, see *Hicks v. Williams*, 17 Barb., 523.

The effect of removing a chattel mortgage from the files, is ordinarily to destroy the effect of filing during its absence therefrom: *Swift v. Hart*, 12 Barb., 534-5; *Fox v. Burns*, 13 Barb., 678, 679-680; *Hicks v. Williams*, 17 Barb., 523; 2 *Hilliard on Mortgages* (4th ed.), 499, ch. 46, § 59; *Fraser v. Gilbert*, 11 Hun, 634, 635, 637.

For a peculiar case, where the question of distribution of proceeds of mortgaged property between three different mortgagees, one of whom had failed to renew, see *Day v. Munson*, 14 Ohio St. R., 488.

Liens for repairs to a vessel in New York, by statute, take preference over a chattel mortgage duly perfected according to the laws of congress: *The William T. Graves*, 14 Blatchf., 139, 8 Benedict, 568.

[2 Queen's Bench Division, 376.]

May 5, 1877.

[IN THE COURT OF APPEAL]

*LEASK V. SCOTT BROTHERS.

[376]

Bill of Lading, Transfer of—Rights as between Transferee and Unpaid Vendor—Valuable Consideration—Stoppage in Transitu.

The transfer of a bill of lading for valuable consideration to a *bona fide* transferee defeats the right of stoppage *in transitu* of the unpaid vendor of the goods, although the consideration was past and not given at the time the bill of lading was handed to the transferee by the lawful holder.

In December, 1875, G. & Co. purchased from defendant a shipment of nuts, to be paid for by acceptance at three months on receipt of shipping documents. On the 1st of January, 1876, G. & Co., being already indebted to plaintiff, applied to him for a further advance, which, he said, he would give, but they must first cover their account. G. & Co. promised to give him cover (not naming any particular securities), and plaintiff at once advanced them a further sum of £2,000. On the 4th of January the bill of lading of the nuts, indorsed in blank, came into the possession of G. & Co. from defendant, and they accepted defendant's draft; and on the following day they handed the bill of lading to plaintiff with other securities, in fulfilment of their promise to give him cover. This transaction between plaintiff and G. & Co. was *bona fide*. On the arrival of the ship on the 3d of February, G. & Co. having in the meantime stopped payment, defendant sought to stop the nuts *in transitu*, and plaintiff claimed them under the bill of lading :

Held, that the plaintiff had a good title as against the defendant.

Rodger v. Comptoir d'Escompte de Paris (Law Rep., 2 P. C., 393) dissented from.

INTERPLEADER action to try the right of the plaintiff as against the defendants to 100 bags of nuts.

At the trial before Field, J., at the London Michaelmas sittings, 1876, the following facts appeared in evidence: On the 22d of December, 1875, Geen, Stutchbury & Co., fruit merchants in London, agreed to purchase of the defendants a shipment of nuts from Naples to London by the Trinidad, "reimbursement as usual," which was by acceptance at three months on delivery of the shipping documents. On Saturday, the 1st of January, 1876, being prompt day, Geen & Co., being already indebted to the plaintiff, their fruit broker, in between £10,000 and £11,000, Mr. Geen applied to him for a further advance of £2,000. The plaintiff said, "You may have it, but you must first cover up your account." Geen said that he would give him cover, and the *plaintiff's cashier at once handed to Geen a check [377 for £2,000. On Tuesday, the 4th of January, the bill of lading, dated the 29th of December, 1875, indorsed by defendants in blank (the nuts being made deliverable to their order), was handed by their agent to Geen & Co., and they at once accepted a draft for the price, £224 16s. 2d.; and on the next day Geen & Co. handed to the plaintiff the bill of

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lading and other similar documents to the value of about £5,000, in performance of their promise on the Saturday to give the plaintiff cover. On Saturday, the 8th of January, Geen & Co. stopped payment. The Trinidad arrived off Liverpool on the 3d of February, and the defendants sought to stop the nuts *in transitu*, the plaintiff claiming them under the bill of lading. The nuts were landed, warehoused, and sold, the price being held to abide the result of this interpleader action.

In answer to questions by the judge, the jury found, that the plaintiff received the bill of lading honestly and fairly; that valuable consideration was given on the understanding of security being given; and that the security given was to secure the £2,000, and also the old account.

The learned judge, after argument, directed judgment to be entered for the defendants, being of opinion that the facts of the case brought it within the principle of *Rodger v. Comptoir d'Escompte de Paris* (¹), affirmed by the decision of *Chartered Bank of India, &c., v. Henderson* (²).

April 16, 17. *Watkin Williams*, Q.C., moved to enter judgment for the plaintiff: Geen & Co. became the lawful holders of the bill of lading on it being handed to them by the defendants indorsed in blank, and on their accepting the defendants' draft at three months for the price, and the plaintiff became lawful holder on it being handed to him by Geen & Co. And according to the findings of the jury, the plaintiff was *bona fide* transferee for valuable consideration from the lawful holder of the bill of lading, and was, therefore, legally entitled to it as against the original vendor. This has been the law ever since the leading case of 378] **Lickbarrow v. Mason* (³); and the distinction, as to past and present consideration, was first taken in *Rodger v. Comptoir d'Escompte de Paris* (¹), and is not to be found in any other case, in the dicta of any judge, or in any text-writer. Moreover, the case of *Chartered Bank of India, &c., v. Henderson* (²), before the same tribunal, while it recognizes the previous decision, very much narrows its application, and the facts of the present case bring it within the later decision. For assuming that the existing debt alone would not have been sufficient consideration, being past, to give a valid title to the plaintiff; here the handing over of the bill of lading was in consequence of a binding contract made on the Saturday to give cover, which could have been enforced both at law and equity.

(¹) Law Rep., 2 P. C., 393.

(²) Law Rep., 2 P. C., 393.

(³) 2 T. R. 63; 6 East, 21, n.

[LORD COLERIDGE, C.J.: *Alliance Bank v. Broom* (*) is an authority that performance of the contract would have been decreed in equity.]

Moreover, although not expressed, it is clear that part of the consideration for giving cover was the forbearance in not taking proceedings to enforce the debt, and this is a continuing present consideration. The distinction, however, between past and present consideration is inconsistent with all the cases. [He then went through the judgment in *Rodger v. Comptoir d'Escompte de Paris* (*) at length, and referred to *Currie v. Misa* (*); *Lempriere v. Pasley* (*); *Holroyd v. Marshall* (*); *Meyerstein v. Barber* (*), citing Blackburn on Sale, pp. 297, 298; *Marie Joseph* (*).]

R. E. Webster (with him *Murphy*, Q.C.), for the defendants. [The arguments for the defendants are so fully given in the judgment of the court that it is unnecessary to repeat them.]

W. Williams, Q.C., was heard in reply.

Cur. adv. vult.

May 5. The judgment of the Court (Lord Coleridge, C.J., and Bramwell and Brett, L.JJ.) was delivered by

BRAMWELL, L.J.: The defendants have stopped *in transitu* the *goods, the subject of this proceeding. They [379 have done so effectually and rightfully, unless the plaintiff has obtained a title to them which cannot be defeated by such stoppage. Whether he has is the question. The facts are few, and as follows: Geen & Co., the consignees of the goods, were indebted to the plaintiff. On Saturday, the 1st of January, they applied to the plaintiff for a further advance, which he agreed to make on being *first* covered. Geen & Co. promised to give him cover (not naming anything in particular), and the plaintiff advanced them a further sum of £2,000, the plaintiff being content with their promise. On the following Tuesday the bill of lading of the goods in question, consigned by the defendants to Geen & Co., came to the possession of the latter, who, on the following day, Wednesday, deposited it with the plaintiff in fulfilment of their promise to cover him. No question turns on the quantity of property so handed over, nor in any way as to the validity of the transfer; for the jury on this have found entirely in favor of the plaintiff.

This being so, the plaintiff contended that he was a *bona*

(*) 2 Dr. & Sm., 289; 34 L. J. (Ch.), 256.

(*) Law Rep., 2 P. C., 393.

(*) Law Rep., 10 Ex., 153, at p. 153.

(*) 2 T. R., 485.

(*) 10 H. L. C., 191; 33 L. J. (Ch.), 193.

(*) Law Rep., 2 C. P., 674.

(*) Law Rep., 1 P. C., 219.

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fide holder of the bill of lading for valuable consideration by transfer from the former lawful holder and proprietor thereof and of the goods mentioned in it. This was not denied by the defendants. Their contention was that, though the plaintiff was such holder effectually as against Geen & Co., and their assignees, if they had become bankrupt, or any one claiming through or against them, except the defendants, yet they, the defendants, had not lost their right to stop *in transitu*. That the right of stoppage *in transitu* is available and effectual against every one, except the assignee of a bill of lading for valuable consideration, and unless that valuable consideration had been got by means of the bill of lading; that, if the consideration were past, it was not such a consideration, and the title gained by it was not such a title as would defeat the equitable right of stoppage *in transitu*. That such right was only defeated where there was a transfer for present consideration. That it was so in such case, because the consignor, or stopper *in transitu*, had by parting with the bill of lading enabled the consignee to get valuable consideration by means of it; and so had indirectly caused the giving of the consideration by the assignee of the bill of lading; but that that was not so 380] where the *consideration was past. There the giver of the valuable consideration was not prejudiced by means of the bill of lading, and consequently there was no reason why the equitable right of stoppage *in transitu* should be lost.

Mr. Webster, for the defendants, at first put it that the equitable right of the consignor should prevail against the equitable right of the transferee of the bill of lading. But, on it being pointed out to him that the title of the transferee was legal, he altered his argument to what is above mentioned, viz., that the equitable right of stoppage prevailed against a legal title acquired by receiving the bill of lading for a consideration, no part of which was caused to be given by the bill of lading. The distinction of the two propositions is material.

In support of his argument Mr. Webster cited *Rodger v. Comptoir d'Escompte de Paris* (') before the Judicial Committee of the Privy Council. We think that that case justifies his argument, and is in point. There may be differences in the facts of the two cases, but the *ratio decidendi* was clearly that advanced for the defendants in the present case. We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it. But

(') Law Rep., 2 P. C., 393.

we cannot. There is not a trace of such distinction between cases of past and present consideration to be found in the books. It is true there is no decision the other way; but wherever the rule is laid down it is laid down without qualification, viz., that a transfer of a bill of lading for valuable consideration to a *bona fide* transferee defeats the right of stoppage *in transitu*. It is true, no doubt, that opinions must be taken *secundum subjectam materiam*, but it is strange that no judge, no counsel, no writer ever guarded himself against appearing to lay down the rule too widely by mentioning this qualification, if he thought it existed. We cannot help saying then that not only is the case a novelty, but it is a novelty opposed to what may be called the silent authority of all the previous judges and writers who have dealt with the subject. More than that, in *Vertue v. Jewell* (¹), where Lord Ellenborough goes out of his way to say that the plaintiff was not a transferee for valuable *consideration so as to defeat the right of stoppage, [381 he puts in, not on the ground that the consideration was past, as was the fact, but on the ground that the transferee had notice of the transferor's insolvency. Further, it is noticeable that this point does not seem to have been mentioned in *Rodger v. Comptoir d'Escompte de Paris* (²) till the reply. The cases cited in the argument at the opening of counsel in that case seem directed to the question of *bona fides*. Still further, with all respect be it said, the reason given in the judgment is not satisfactory. It is said (³), "The general rule, so clearly stated and explained by Lord St. Leonards in the case of *Mangles v. Dixon* (⁴), is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it." No doubt. But that rule does not apply here. Lord St. Leonards said that in reference to a case where the title was to a chose in action, an equitable title only, or, dropping such an expression, a right against a person liable on a contract; and he held that the assignee of that right was in the same situation as the assignor. Here the plaintiff's title is, as it was in *Rodger v. Comptoir d'Escompte de Paris* (²), a title to property in ownership, and to use the old expression, a legal right.

If, besides dealing with the authorities, we look at the reason of the thing, we are led, with deference, to the same conclusion. All the arguments used by Mr. Justice Buller,

(¹) 4 Camp., 31.

(²) Law Rep., 2 P. C., at p. 403.

(³) Law Rep., 2 P. C., at p. 405.

(⁴) 3 H. L. C., 702.

(⁵) Law Rep., 2 P. C., 393.

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Tassell v. Ovenden.

384] elsewhere than in the metropolitan district, *or the metropolitan police district, or a town or populous place as severally defined by 'The Licensing Act, 1874,' are directed to be closed, unlawfully did keep open certain premises for the sale of intoxicating liquors by retail," was heard and the appellant convicted in a penalty of £1 and costs.

Upon the hearing it appeared that the appellant occupied a shop in Headcorn, where he sold drapery, grocery, and wines and spirits, not to be consumed on such premises.

On the day named in the information, a police constable, at twenty-five minutes past ten o'clock at night, found the appellant's shop open in the usual way of his trade; he went in and told the appellant that his shop ought to be closed at ten o'clock at night. The appellant drew the police constable's attention to a large wooden case that was standing in the shop, and to a printed notice that was hanging on the case. The constable observed that the front of the case was closed with interlaced shutters, and at the end of the last shutter there was a lock. The appellant told the constable that the case was locked, and took hold of the shutters to show they were properly secured by the lock; he also produced a key, but did not try the lock with it. The wooden case above mentioned was eight feet by five, and capable of holding thirty dozen of bottles; it stood close to the entrance of the shop before the ordinary counter, and any person entering the shop could immediately see the contents when the shutters were not up; but when up the contents could not be seen. The notice hanging on the case was as follows:—

"Notice. Customers are informed that in accordance with the new Licensing Act, Messrs W. & A. Gilbey's wines and spirits cannot be supplied in this shop after ten o'clock at night," and there was a similar notice placed in the shop window.

There was no proof of any sale, or exposure, of intoxicating liquors at the time in question, nor that liquors were kept in any other place in the shop other than in the wooden case.

It was contended on behalf of the appellant that he had not committed any offence against ss. 3 and 9 of "The Licensing Act, 1874," under which the information was laid. That the shop was kept open for the sale of grocery and drapery as the appellant was entitled to keep it, notwithstanding the sections of the act *before referred to, which require him to close at ten o'clock, provided there was a *bona fide* intention on his part not to sell intoxi-

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cating liquors after that hour, and that he had done as much as he could to show that such was his intention.

The justices, however, thought that ss. 3 and 9 of "The Licensing Act, 1874," were unexceptional, and it was imperative that the appellant should close his licensed premises at ten o'clock at night.

Tickell, for the appellant: The conviction was wrong. To constitute an offence within 37 & 38 Vict. c. 49, s. 3, it is necessary that premises should be kept open for the sale of liquor, and here there was no evidence that the appellant kept open his shop with the object of selling wine. [He was then stopped.]

Biron, for the respondent: There was evidence to support the conviction. In *Brigden v. Heighes* (') the appellant had two shops, a grocer's and a draper's shop, communicating with each other. He shut up, at the appointed hour, the grocer's shop where he sold wine, but kept the draper's shop open. It was held that there was no evidence to justify a conviction, but expressly on the ground that the shop where he sold wine was closed, and separated from the other.

[FIELD, J.: Here the shop was kept open, but was it kept open for the sale of liquor?]

The words in s. 3 which describe the offence, "keeps open such premises for the sale of intoxicating liquors," mean that after a certain hour it shall not be lawful to keep open premises of a particular kind, i.e., premises for the sale of intoxicating liquors, or premises where such liquors are sold. It is not necessary that the premises should be kept open with the object of selling liquor: it is enough if they are kept open. The Legislature appears to have thought that the safer course was to require the place itself to be shut to the public.

Tickell, in reply: The construction contended for is too inconvenient to have been contemplated. Under 35 & 36 Vict. c. 94, s. 25 (which is incorporated with 37 & 38 Vict. c. 49), if, during any period during which any premises are required under the act *to be closed, any person is [386 found on such premises he shall, unless he satisfies the court that he was an inmate, servant, or a lodger on such premises, or a *bona fide* traveller, &c., be liable to a penalty of forty shillings. It could never have been meant that any one of the grocery or drapery customers should be liable to this penalty if he entered the shop after ten o'clock.

(') 1 Q. B. D., 330; 16 Eng. Rep., 384.

MELLOR, J.: This conviction cannot be upheld. I do not know what may have been the original intention of the Legislature, but I think that s. 3 has not the meaning which at first sight it would appear to have, and that the penalty is not imposed upon any person who after the hour mentioned in the section keeps open his premises for some purpose unconnected with the sale of intoxicating liquors. The offence as described in the section is selling or exposing for sale intoxicating liquor, and the facts stated by the magistrates are quite silent as to any sale of liquor or intention to sell it. It is further to be considered that s. 25 of 35 & 36 Vict. c. 94 imposes a penalty on persons who are found in the house after the prescribed hour, unless they can show that they come within certain exceptions. Taking these facts together, I think the safer construction of s. 3 is to hold that it applies to persons who after the prescribed hour keep open their premises for the purpose of selling liquor, but that the magistrates are not justified in convicting when it appears that nothing of the kind was intended. In *Brigden v. Heighes* (¹), the argument of the counsel for the appellant and the judgment of the court rely, no doubt, upon the fact that there was a *bona fide* closing of the grocer's shop, and not merely upon the fact that there was no evidence that liquor was exposed for sale, and both I and my Brother Field probably used expressions from which it might be argued that we thought that the act requires that the house and premises where the liquor is sold must be closed. But we had not to consider a case like the present, and I must hold that, in the absence of proof that there was a sale or exposure for sale of liquor, the conviction was wrong.

FIELD, J.: I am of the same opinion. *Brigden v. Heighes* (¹) is no authority in favor of this conviction. Here, 387] the appellant *kept a shop for the sale of intoxicating liquors off the premises, and it appears that he has a case where his bottles of wine are kept, and that when this case is closed, the liquor cannot be seen. Everything shows that there was a *bona fide* intention not to sell wine after the prohibited hour; but the statement in the case, "the justices thought that ss. 3 and 9 were unexceptional, and that it was imperative that the appellant should close his licensed premises at ten o'clock," shows that they thought they were bound to convict. The construction of s. 3 which Mr. Biron has suggested, according to which there is a simple prohibition to keep open during certain hours, premises of a

(¹) 1 Q. B. D., 330; 16 Eng. Rep., 384.

particular description, at first caused me some difficulty, but the arguments which we have heard have quite removed it.

Judgment for the appellant.

Solicitors for appellant: *W. Braikenridge & Sons*, for J. Case & Son, Maidstone.

Solicitors for respondent: *Beal & Hoar*, Maidstone.

See Bishop's Statutory Crimes, § 1058.

[2 Queen's Bench Division, 387.]

April 14, 1877.

[IN THE COURT OF APPEAL.]

THE METROPOLITAN RAILWAY COMPANY V. DEFRIES and Others (').

Vender and Purchaser—Rent—Use and Occupation—Admission by Demurrer.

Claim, that by an agreement for the purchase by the plaintiffs of property belonging to the defendants, the purchase was to be completed on the 29th of September, 1869, from which time the plaintiffs were to receive all rents and profits and to pay interest on the purchase-money until the completion of the purchase. That the purchase was not completed until the 13th of March, 1876, and that the plaintiffs had duly paid the interest. That the defendants had remained in possession, but had paid no rent. That the plaintiffs claimed rent for use and occupation at the rate of £150 per annum as a fair value. The defendants demurred:

Held, affirming the judgment of the Queen's Bench Division, that under the agreement a fair rent must be paid by the defendants for the time they remained in possession, and that by demurring they had admitted £150 a year to be a fair rent.

APPEAL by the defendants from the judgment of the Queen's Bench Division for the plaintiffs on demurrer to claim (').

**Gates*, Q.C. (with him *Edward Pollock*), for the [388 defendants: The plaintiffs ought to state distinctly what they claim, and ought to have proceeded before the Chancery Division, which could have assessed an occupation rent. It does not follow that any rent is payable: *Leggott v. Metropolitan Ry. Co.* ('). The occupation may not have been beneficial to them. The property has not been let, and the defendants have merely remained in possession until they were paid. At all events judgment cannot be given for £150 a year for seven years merely because it is claimed.

J. J. Aston, Q.C., and *P. Gye*, for the plaintiffs, were not called upon.

(') Affirming 20 Eng. Rep., 272.

(*) *Ante*, p. 189; 20 Eng. Rep., 272.

(*) Law Rep., 5 Ch., 718.

LORD COLERIDGE, C.J.: In my opinion this judgment ought to be affirmed. [The Lord Chief Justice stated the terms of the agreement.] It was contended that the agreement must be strictly construed, and that the rents and profits must be such as were actually received, the relation of landlord and tenant not existing between the parties. But that is not the true construction of this agreement. The true construction is that which has been put upon it by the court below, that a fair rent must be paid by the vendors for the benefit which they have had by their occupation. The demurrer admits that the sum claimed is the right sum as the fair value of the rents and profits. The defendants might have said that £5 or £10 a year was the fair value, and might have paid that sum into court. They have not done so, but have taken their chance of succeeding on the demurrer. The demurrer must be overruled and the judgment affirmed.

BRAMWELL, L.J.: I am of the same opinion. The agreement contemplated that there might be delay, and provided for payment of interest and for the receipt of the rents and profits. It was admitted that if rent had been received by the defendants they would be liable; but it was argued that the occupation had, as in *Leggott v. Metropolitan Ry. Co.* (1), not been beneficial. That argument, however, is of no avail, for on this demurrer the defendants admit, in fact, that there has been a beneficial occupation, and they must account for it.

389] *The only misgiving I have is, whether there is an admission that £150 a year is the fair value of the occupation rent; but I think that we must hold this to be admitted on the demurrer as not having been specifically denied.

BRETT, L.J.: The only doubt I feel is that expressed by Sir G. Bramwell; but I think that under the new mode of pleading the defendants must be held to have by their demurrer admitted everything stated in the claim.

The conclusion which I should draw is, that whatever might have been advisable under the old system, it is not advisable since the Judicature Acts came into operation to demur.

Judgment affirmed.

Solicitors for plaintiffs: *Burchells.*

Solicitors for defendants: *Scard & Son.*

(1) Law Rep., 5 Ch., 716.

[2 Queen's Bench Division, 389.]

April 18, 1877.

(1) GRECE, Appellant; HUNT, Respondent.

(2) GRECE, Appellant; HUNT, Respondent.

GRECE, Appellant; COMBER, Respondent.

GRECE, Appellant; CROWHURST, Respondent.

The Local Government Act, 1858 (21 & 22 Vict. c. 98), ss. 62, 63—The Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 69—Sewering, Paving, &c.—Liability of Owner of Premises—Expenses incurred by Local Board—Notice of Apportionment—Demand, when necessary—Time within which summary Proceedings may be taken—11 & 12 Vict. c. 43, s. 11.

Where works are executed by a local authority for the improvement of a street under 11 & 12 Vict. c. 63, s. 69, and 21 & 22 Vict. c. 98, s. 63, and the expenses charged upon the owners of the premises fronting the street, it is necessary before summary proceedings can be taken for the recovery of the amount apportioned upon any such owner, that a demand of payment of the sum so apportioned should be served upon him, and the six months within which the summary proceedings must be taken, under 11 & 12 Vict. c. 43, s. 11, are to be reckoned from such notice of demand, and not from the notice of apportionment, which is not a sufficient demand.

[2 Queen's Bench Division, 397.]

April 18, 1877.

**Ex parte* THE SCHOOL BOARD OF LONDON. [397]
Re MURPHY.

Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 74—Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 11—By-laws Nos. 2 & 7—Habitual or occasional Neglect of Parent to send Child to School—Discretion of Magistrate to direct Form of Summons.

Where, upon application to a magistrate by a school board for a summons against the parent of a child for not causing it to attend school, contrary to by-laws made by the board under the Elementary Education Act, 1870, it appears that the parent has habitually neglected to provide instruction for the child within the meaning of the Elementary Education Act, 1876, s. 11, the magistrate is entitled, and it is his duty, to refuse to grant the board a summons under the by-laws, and to require them to take out a summons under s. 11,—for the option given by the Elementary Education Act, 1876, s. 50, of proceeding either under the statute or the by-laws applies only to offences "punishable" under the act, and the offence of "habitual neglect" is not so punishable.

[2 Queen's Bench Division, 408.]

June 7, 1877.

403] *LESTER, Appellant; TORRENS, Respondent.

Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12—"Found drunk on Licensed Premises"—Licensed Person found drunk on his own Licensed Premises after the Premises are closed.

The term "licensed premises," as used in the Licensing Act, 1872, s. 12, means licensed premises while they are open to the public for the purposes of the license; consequently a licensed person who is found drunk on licensed premises in his own occupation, after licensed hours and when the premises are closed to the public, is not liable to a penalty under s. 12.

CASE stated by the stipendiary magistrate of Salford, under 20 & 21 Vict. c. 43.

The facts were as follows: An information had been laid against the appellant under the Licensing Act, 1872, 35 & 36 Vict. c. 94, s. 12, for being found drunk on licensed premises. At half-past eleven at night the appellant, a licensed person, was found drunk by a policeman on licensed premises in his own occupation. The premises had been closed for the night, and no one was on them, besides the appellant, but his wife and family and servants. The magistrate convicted the appellant, and fined him under the 12th section. The question for the court was whether he was rightly so convicted.

Ambrose, Q.C., for the appellant: The 12th section does not apply to the case of a licensed person. The 13th and subsequent sections apply to his case. If the section does apply to a licensed person there was no offence here within the section. The section is aimed at offences against public order. Here there was no such offence. "Licensed premises," within the section, means premises being used as licensed premises within business hours. Here the premises, being closed, were in the same position as any other
404] *private premises. The statute 21 James I, c. 7, which makes drunkenness an offence generally, is repealed by the act.

[He cited 35 & 36 Vict. c. 94, s. 67, and *Warden v. Tye* (').]

McIntyre, Q.C., for the respondent: The 12th section applies to all persons, both licensed persons and others.

The facts here bring the appellant within the plain words of the section. The provisions of the statute of James are no doubt repealed to the extent that drunkenness is only an

(') 2 C. P. D., 74.

offence now when it occurs in certain places. Licensed premises are among those places. There is nothing whatever in the section to limit its effect to the time during which the premises are open. If a man were found drunk on licensed premises after closing time, not being a licensed person, would he not be within the section?

MELLOR, J.: I am of opinion that the decision of the magistrate was erroneous. It seems to me that the construction of the 12th section suggested by the respondent is far too large. It would produce the most singular consequences if carried out to its extreme results. According to that construction a publican is placed by the section in his private capacity in a position wholly unlike that occupied by any other person. In addition to his obligations with regard to the conduct of his business, it is suggested that he comes under the obligation, while in his own premises, to be sober not only all day but all night. It is, no doubt, very desirable that he should be so, but we have not to do with the morality of the question but with the penal provisions of the act. It would be a strange construction to hold that during the whole night the premises are licensed premises for the purpose of the 12th section. In order to put the proper limitation on this part of the section we must look at the context. The words connected with "licensed premises" are, "found drunk in any highway or other public place, whether a building or not." The word "found" in connection with "public place" seems to me to point to the true meaning. When the premises are open during the hours of business, and so a person may, as one of the public, enter and find the offender drunk, the section applies, and I am inclined to think that it would apply whether the person so found was tenant of the *house or not. [405 But I cannot think that when the house is closed and everybody excluded but the inmates, because a constable happens to be fetched in for some purpose and finds the landlord drunk, that that is a finding drunk on licensed premises within the meaning of the section. Publicans would, if this were so, be distinguished in their private capacity from any other class of persons. I think the Legislature would have used other words than these, if they had meant to produce such a result. The premises no longer being a public house for the purposes of public resort, I think the section did not apply, and the conviction must therefore be quashed.

LUSH, J.: Some qualification must obviously be introduced to carry out the intention of the section. I think it

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may be found in the heading of these clauses, viz., Offences against Public Order. It is clear that it was not intended to punish drunkenness in general, for the provision of the statute of James, which did so, was repealed, and no similar provision re-enacted. Drunkenness is only so far made an offence as it is an offence against public order. I cannot, however, agree with Mr. Ambrose that innkeepers are excluded from section 12 altogether. Why should an innkeeper found drunk on a highway not be liable to the penalty? That section deals with a person as a member of the public, and an innkeeper is within the section as a member of the public. The section adds to the words "public place" the words "whether a building or not." This was necessary because a building open alongside the highway is as much public for the purposes of the act as the highway. I think, looking at the collocation of words, that "licensed premises," for the purposes of the section, must mean premises open to the public during licensed hours, or during the time when the premises are a *quasi* public place.

It seems to me that the innkeeper, if drunk on his own premises while they are open, is as much amenable to the penalty as if he was found drunk on the highway. It is clear, however, that the section does not apply to a person, not being an innkeeper, found drunk in his own private house. If the innkeeper lived next door to the licensed premises, he might be drunk in his own house without being liable. Why should he be liable if he lives on the 406] *licensed premises and gets drunk at a time when they are not open, because during certain hours of the day they are open to the public? When they are closed, they are as much his private house as a house in which he lives next door. It is contended that the act applies to licensed premises at all times of the day. This would have the effect of making an innkeeper who gets drunk in his own bedroom liable. It cannot have been intended that the section should produce such an extraordinary result. The section must apply only to licensed premises, meaning premises used for the time being as licensed premises, and so open to the public.

Conviction quashed.

Solicitors for appellant: *Le Riche & Son.*

Solicitors for respondent: *Milne, Riddle & Mellor.*

[2 Queen's Bench Division, 406.]

June 7, 1877.

BROWN, Appellant; THE GREAT EASTERN RAILWAY COMPANY, Respondents.

By-law—Railway Company—Notice of Amount demanded—"Penalty or Forfeiture"—
8 & 9 Vict. c. 20, s. 145.

A by-law made by a railway company imposed upon a passenger failing or refusing to produce his ticket the liability to pay the amount of the fare from the station whence the train, by which such passenger travelled, had originally started:

Held, that there must be a demand of the specific sum payable in respect of such fare, in order to enable the company to recover it:

Seemle, that such sum is a penalty or forfeiture within 8 & 9 Vict. c. 20, s. 145.

Chilton v. London and Croydon Ry. Co. (16 M. & W., 212) discussed.

CASE stated by justices, under 20 & 21 Vict. c. 43.

The facts were in substance as follows:—

An information had been laid under 8 & 9 Vict. c. 20, s. 145, by the respondents against the appellant, for that being a passenger on the railway he had failed to show his ticket, when required to do so by a servant of the company, contrary to one of the company's by-laws.

The by-law was as follows: "No passenger will be allowed to enter any carriage on the railway, or to travel therein upon the *railway, unless furnished by the [407] company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall show and deliver up his ticket (whether a contract or season ticket, or otherwise) to any duly authorized servant of the company whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey."

The defendant did travel from some station on the company's line as far as Stratford, and when asked by the ticket collector there to show his ticket, failed to do so. He was the holder of a season ticket from Brentwood station to Liverpool Street station. The train in which he was travelling had started from Colchester and the fare from thence was 7s. 6d. No demand was made from the appellant of any specific sum under the by-law.

It was contended before the magistrates for the appellant, first, that the amount required to be paid must be demanded at the time when the offence was committed, and, secondly,

that this was not the case of a penalty or forfeiture under 8 & 9 Vict. c. 20, s. 145.

The magistrates convicted the appellant in the sum of 7s. 6d. and costs.

Brown, Q.C. (*McLeod* with him), for the appellant: It is clear that a demand of the specific sum, which the company alleged that the appellant was liable to pay, was necessary. The facts upon which that amount depends are in the knowledge of the company, and not of the appellant.

The case falls, therefore, within the principle of the cases in which it has been held that when the amount of a money demand alleged to be payable by one party to another depends on some fact known to the party making the claim, and not to the other, notice to the latter of the specific sum demanded must be proved. The party failing to produce his ticket may wish to avoid all litigation, and pay the amount. But he cannot, unless informed what it is.

Secondly. The amount payable under the by-law is not in 408] the *nature of a penalty or forfeiture, and so not recoverable before magistrates summarily under 8 & 9 Vict. c. 20, s. 145, which relates only to the recovery of a "penalty or forfeiture." The by-law merely contains a provision that if the passenger cannot produce his ticket he is to pay a fare calculated from the place whence the train started. This is for the protection of the company, who cannot know where the passenger got into the train, and not for the punishment of the party. The company's proper remedy was to sue in the county court. In *Chilton v. London and Croydon Ry. Co.* (¹), Parke, B., held that such a by-law did not impose a penalty or forfeiture. A reason for not construing the by-law as imposing a penalty or forfeiture is that it possibly might be bad for uncertainty if so construed.

Metcalf, Q.C. (*A. Metcalf* with him), for the respondents: The actual decision in *Chilton v. London and Croydon Ry. Co.* (¹) did not turn on the question whether such a by-law imposes a penalty or forfeiture, but on the question whether the company could arrest the passenger under such a by-law if he refused to pay. It is submitted that in substance this is in the nature of a penalty or forfeiture. The remedy by suing in the county court would be quite inadequate, and in many cases entirely ineffectual. No demand of the amount was necessary in a case where, as here, the party never asked for any information as to what the amount was, or showed any intention of paying it volun-

(¹) 16 M. & W., 212; 16 L. J. (Ex.), 89.

tarily. The summons itself was a sufficient demand. [He cited *Dearden v. Townsend* (¹), and *Woodard v. Eastern Counties Ry. Co.* (²).]

Brown, Q.C., in reply.

MELLOR, J.: I am of opinion that the company, whose by-law deals in this way with the cases of persons who fail or refuse to show their tickets, are bound, before they can recover the amount of the payment so imposed upon the person in default, to inform him of the amount he becomes so liable to pay when the offence has been committed. It would, as it appears to me, be safer in such cases to affix a specific sum, by way of penalty, to the offence; but I am inclined to think it is sufficient in the case of a railway *where the maximum amount of the payment that [409 could thus be imposed would not exceed £5, to say, as is done here, that the offender shall pay the amount of the fare from the place whence the train started. But if that is done, then I feel confident that there can be no recovery of such amount without a demand of the specific sum. If it were otherwise, then, however willing the party might be to pay it, the company could compel him to come before the magistrate. The by-law is intended to protect the company against excuses for the non-production of the ticket, into the truth of which they have no opportunity of investigating; and if a person enters a carriage and assumes the character of a passenger, but fails to produce the ticket, then, for the protection of the company, who have no means of knowing from what station he has travelled, he is bound to pay the fare from the remotest point at which the train started. But the place from which the train originally started and the amount of such fare are matters which are in the knowledge of the company, and not of the passenger. Unless the company make a demand, the passenger cannot tender any sum, so as to excuse himself. It is clearly necessary, on principle, that there should be such a demand. I am inclined to think, notwithstanding the great weight which must be attached to the opinion expressed by Lord Wensleydale in *Chilton v. London and Croydon Ry. Co.* (³), which, however, was not necessary to the decision of the case, that this is a case of a penalty or forfeiture. It is, however, unnecessary to decide the point. For these reasons the conviction must be quashed.

LUSH, J.: I should say, if it were necessary to decide the point, that the imposition of a fare which would generally

(¹) Law Rep., 1 Q. B., 10.

(²) 30 L. J. (M.C.), 196.

(³) 16 M. & W., 212; 16 L. J. (Ex.), 89.

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be larger than the fare for the journey on which the person in default had travelled is in the nature of a penalty or forfeiture. It is the exaction of a larger sum as a punishment for acts of commission or omission. I also think, if it were necessary to decide it, that the by-law is not bad because it does not fix a specific penalty. It seems to be quite as good as many of the by-laws referred to as good in Comyns' 410] Digest, title "By-law" (B. 4); for instance, a *by-law that every burgess of St. Albans pay a reasonable sum for building of the courts when the term was held there. The principle of *id est certum quod certum reddi potest* appears to apply in these cases. Nor do I think that the by-law was bad in the case of this company, because in the case of some companies it might impose a sum larger than £5. In the case of this company it clearly could not. All these points, however, it is not necessary to decide, because I am clearly of opinion that the sum so imposed being of uncertain amount, in the sense that it would have to be ascertained by reference to matters better known to the company than to the party in default, must be demanded before proceedings can be taken for its recovery. It is one of those cases where, according to the principles of the common law, notice must be given to the party of the amount he has become liable to pay, inasmuch as he cannot be presumed to know it.

Conviction quashed.

Solicitor for appellant: *W. W. Brown.*

Solicitor for respondents: *Shaw.*

[2 Queen's Bench Division, 410.]

Feb. 3, 1877.

[CROWN CASE RESERVED.]

THE QUEEN V. FLATTERY (¹).

Rape—Consent—Submission—Carnal connection under Pretence of Surgical Operation.

The prisoner professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen, consulted him with respect to illness from which she was suffering. He advised that a surgical operation should be performed, and under pretence of performing it, had carnal connection with the prosecutrix. She submitted to what was done, not with any intention that he should have sexual connection with her, but under the belief that he was merely treating her medically and performing a surgical operation, that belief being wilfully and fraudulently induced by the prisoner:

Held, that the prisoner was guilty of rape.

Reg. v. Barrow (Law Rep., 1 C. C., 156) questioned.

(¹) S. C., 13 Cox's Crim. Cas., 388.

CASE stated by Hawkins, J.

The prisoner, John Flattery, was indicted for a rape upon Lavinia Thompson at Halifax, in the county of York, on the 4th of November, 1876. He was tried at the Winter Assizes at *Leeds, in December, 1876, and was con- [411] victed, but the learned judge postponed judgment until the next assizes, in order to obtain the opinion of the court upon the following case:—

Lavinia Thompson, the prosecutrix, is nineteen years of age, and she is the daughter of, and lives with, Thomas and Hannah Thompson, who are laboring people in the neighborhood of Halifax.

On and for some time previous to the 4th of November last she was in ill-health and subject to fits. On the 4th of November, 1876 (being market day at Halifax), with a view to obtain medical and surgical advice and relief, she went with her mother to Halifax to consult the prisoner, who kept an open stall in the market, at which he professed, for money consideration, to give medical and surgical advice. They went together to the prisoner's stall, and there saw him, and in the presence and hearing of the prosecutrix, her mother told the prisoner her condition as aforesaid, and that she was subject to fits, and consulted him as to a remedy. The prisoner expressed a desire to examine the prosecutrix with a view to giving the advice sought, and requested the prosecutrix and her mother to follow him to the Peacock Inn, which was close by, for that purpose, and they did so.

At the Peacock Inn the prisoner put several questions to her mother touching the condition of the prosecutrix, and made some examination of her person. Having done this, the prisoner, not believing that the advice he was about to give would be of any service to prosecutrix, not intending nor with any view to perform a medical or surgical operation, but solely with a view to gratify his lust, and have that carnal sexual knowledge of her person which he afterwards had, as after stated, fraudulently and knowing that he was speaking falsely, told the mother, in the presence and hearing of the prosecutrix, that "it was nature's string wanted breaking," and asked if he might break it. The mother replied that she did not know what he meant (as in fact she swore she did not), but that she did not mind if it would do her daughter any good. At that moment the prosecutrix, in the prisoner's presence, had a fit and fainted away. When she came to herself again, the prisoner, in the prosecutrix's presence and hearing, fraudulently and falsely repeated that nature's string *wanted break- [412]

ing, and added that if that did not do her good nothing would, and he again then asked if he might break it. Again the mother said she did not mind if it would do her daughter, the prosecutrix, any good. On this the prisoner said to the mother, "You stay here, and I'll try." He then went into a small adjoining room, followed by the prosecutrix, solely in order, as he represented, and as the prosecutrix and her mother believed, that he might perform the operation he had advised, and which both the prosecutrix and her mother, on the prisoner's representation aforesaid, believed would probably effect her cure, and not with any intention on the part of the prosecutrix that the prisoner should have sexual connection. In that room the prisoner put the prosecutrix on the floor, and then and there had carnal sexual connection with her, the prosecutrix making but feeble resistance, believing (as she swore) that the prisoner was merely treating her medically, and performing a surgical operation, as he had advised, to cure her of her illness and fits, and submitting to his treatment solely because she so believed, such belief having been wilfully and fraudulently induced by the prisoner as aforesaid. Unless such submission amounted in law to consent, there was no consent to the prisoner having connection with the prosecutrix.

The question was whether, under these circumstances, the conviction was warranted in law.

Lockwood, for the prisoner: On the evidence as stated, the prosecutrix submitted, in such a sense as that her submission was equivalent to consent, to the act of connection. And, that being so, the act was not rape, even though consent was obtained by fraud: *Reg. v. Barrow*(¹). The case differs from *Reg. v. Case*(²), where the prosecutrix did not know the nature of the act done to her. There is no such finding here; and in the absence of an express finding it cannot be presumed, especially having regard to the age of the girl.

[*Reg. v. Fletcher*(³) and *Reg. v. Barratt*(⁴) were also referred to.]

413] *Sir H. Giffard*, S.G. (*C. Bowen* with him), for the prosecution, was not called upon.

KELLY, C.B.: I think this conviction ought to be affirmed. Mr. Lockwood has ably argued that there was consent on the part of the prosecutrix, and therefore no rape. But, on the case as stated, it is plain that the girl

(¹) Law Rep., 1 C. C., 156.

(²) Bell, Cr. C., 68; 28 L. J. (M.C.), 85.

(³) 1 Den. Cr. C., 580; 19 L. J. (M.C.),

(⁴) Law Rep., 2 C. C., 81.

only submitted to the plaintiff's touching her person in consequence of the fraud and false pretences of the prisoner, and that the only thing she consented to was the performance of a surgical operation. Up to the time when she and the prisoner went into the room alone, it is clearly found on the case that the only thing contemplated either by the girl or her mother was the operation which had been advised; sexual connection was never thought of by either of them. And after she was in the room alone with the prisoner, what the case expressly states is that the girl made but feeble resistance, believing that she was being treated medically, and that what was taking place was a surgical operation. In other words, she submitted to a surgical operation and nothing else. It is said, however, that, having regard to the age of the prosecutrix, she must have known the nature of sexual connection. I know no ground in law for such a proposition. And, even if she had such knowledge, she might suppose that penetration was being effected with the hand or with an instrument. The case is therefore not within the authority of those cases which have decided, decisions which I regret, that where a man by fraud induces a woman to submit to sexual connection, it is not rape.

MELLOR, J.: I am of the same opinion. In the statute 13 Edw. 1, c. 34, rape is defined to be, "if a man ravish a married woman, maid, or other woman, when she neither assented before nor after." It is said that submission is equivalent to consent, and that here there was submission. But submission to what? Not to carnal connection. The case is exactly within the words of Wilde, C.J., in *Reg. v. Case*(¹): "She consented to one thing, he did another materially different, on which she had been prevented by his fraud from exercising her judgment and will." I agree with the Chief Baron's regret at the decision [414 in *Reg. v. Barrow* (²). If the point there decided should arise again before me, I should take such a course as that the matter might be reconsidered.

DENMAN, J.: I am of the same opinion. I can see nothing in the case amounting to consent, either in fact or in law, to the act of carnal connection. I think the definition of rape in the statute cited may be accepted, subject to one qualification. There may be cases where a woman does not consent in fact, but in which her conduct is such that the man reasonably believes she does. I agree in wishing that the point decided in *Reg. v. Barrow* (²) should be reconsidered.

(¹) 1 Den. Cr. C., at p. 582.

(²) Law Rep., 1 C. C., 156.

FIELD, J.: I am of the same opinion. The question is one of consent, or not consent; but the consent must be to sexual connection. There was here no such consent. As to *Reg. v. Barrow* (1), the question there was different; but I also should hesitate to apply that case.

HUDDLESTON, B.: I am of the same opinion. The question is whether the prosecutrix consented that the prisoner should have connection with her. This she did not. Therefore the case is different from *Reg. v. Barrow* (1), where the woman permitted the intercourse, though under a mistake fraudulently induced as to the person. But I too should like to have the point decided in that case reconsidered.

Conviction affirmed.

Solicitor for prosecution: *Solicitor for the Treasury.*

Solicitor for prisoner: *J. H. Leeming, Halifax.*

(1) Law Rep., 1 C. C., 156.

See 7 Eng. Rep., 823 note; 1 Bish. Cr. Law, § 261; 2 id., §§ 1121-8.

As to rape, after the administration of chloroform, see article 1 Monthly Western Jurist, 289; 2 Bish. Cr. Law (6th ed.), § 1126.

As to alleged rape by medical attendant, under claim of medical or surgical treatment, see article 2 Jour. Psychological Med., 49.

The doctrine in this country seems to be, that one is not guilty of a rape who has connection with a woman under pretence of giving medical treatment: *Walter v. People*, 50 Barb., 144; *Don Moran v. People*, 25 Mich., 356; 2 Bish. Cr. Law (6th ed.), § 1122.

The rule seems to be otherwise in England: 1 Bish. Cr. Law (6th ed.), § 261.

See *Stephen v. State*, 11 Geo., 226; *Clark v. State*, 30 Tex., 448.

It has been held, that forcibly having connection with a woman intoxicated to the point of insensibility is not a rape: *People v. Quinn*, 50 Barb., 128; *Com. v. Childs*, 10 Pittsb. Leg. Jour., 209, 2 Pittsb. Rep., 391.

See 2 Bish. Cr. Law (6th ed.), § 1122; *Don Moran v. People*, 25 Mich., 356, if the woman be deprived of the power of resistance. See also, *Com. v. Burke*, 105 Mass., 379, and cases cited; *Com. v. Childs*, 10 Pittsb. Leg. Jour., 209, 2 Pittsb. Rep., 391.

On the contrary, it has been held that a man who has carnal intercourse

with a woman (not his wife) without her consent, and while he knows that she is insensible and incapable of consenting, is guilty of a rape: *Com. v. Burke*, 105 Mass., 376, 379, and cases cited.

Where the defendant got into bed with a woman, intending to have carnal connection with her while she was asleep, and in pulling up her night garment awoke her, using no other force; held that this was not an attempt to ravish within the meaning of the statute: *Com. v. Fields*, 4 Leigh (Va.), 648.

Nor of an attempt to commit rape, unless the defendant intended to use force if the artifice failed: *Walter v. People*, 50 Barb., 144.

But see *State v. Neeley*, 74 N. C., 425, 21 Am. Rep., 496, where it was held that proof that a negro chased a white woman when passing through woods until she came in sight of a house, crying out to her several times to stop, was evidence to justify a conviction for assault with intent to commit a rape.

So, fraudulently personating the husband of a woman, and thus having connection with her, is not a rape: *State v. Brooks*, 76 N. C., 1; *Reg. v. Sweeney*, 8 Cox's Cr. Cas., 223, High Court of Justiciary, Scotland; *Reg. v. Barrow*, L. R., 1 C. C. Res., 156, 11 Cox's Cr. Cas., 191; *Regina v. Francis*, 18 U. C. Q. B., 116.

It has been held that having carnal

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connection with an insane female is not a rape: *State v. Crow*, 10 Western Law Jour., 501.

See, however, 2 Bish. Cr. Law (6th ed.), § 1123.

It has been held otherwise of an idiot girl: *Reg. v. Fletcher*, L. R., 1 C. C. Res., 391, 10 Cox's Cr. Cas., 248; *State v. Tarr*, 28 Iowa, 397.

But see 2 Bish. Cr. Law (6th ed.), § 1121; *Reg. v. Pressy*, 10 Cox's Cr. Cas., 635; *Reg. v. Barrett*, 7 Eng. Rep., 320; *Reg. v. Fletcher*, Bell's Crown Cases, 63, 8 Cox's Cr. Cas., 131.

In the case of rape of an idiot or lunatic, the mere proof of connection will not warrant the case being left to the jury. There must be some evidence that it was without her consent—e.g., that she was incapable, from imbecility, of expressing assent or dissent; and if she consent from mere animal passion, it is not rape.

In this case the charge was assault, with intent to ravish. The woman was insane, and there was no evidence as to her general character for chastity, or anything to raise a presumption that she would not consent. The jury were directed that if she had no moral perception of right and wrong, and her acts were not controlled by the will, she was not capable of giving consent, and the yielding on her part, the prisoner knowing her state, was not an act done with her will. They convicted, saying she was insane and consented. Held, that the conviction could not be sustained.

On an indictment for attempting to have connection with a girl under ten, consent is immaterial; but in such a case there can be no conviction for assault, if there was consent: *Regina v. Connolly*, 26 U. C. Q. B., 317.

[2 Queen's Bench Division, 415.]

April 21, 1877.

[CROWN CASE RESERVED.]

*THE QUEEN V. SCOTT (¹)

[415]

Perjury—Evidence of Suit in which Perjury committed—Rules of Supreme Court, Order v, Rule 7, Order XLI, Rule 1.

Upon an indictment for perjury, charged as having been committed on the trial of an action in the High Court of Justice, the existence of the action is sufficiently proved by the production, by the officer of the court, of the copy writ filed under Order v, Rule 7, and the copy pleadings filed under Order XLI, Rule 1, of the Rules of the Supreme Court.

(¹) The report of this case in Cox's Criminal Cases is better than that in Queen's Bench Division. It was accordingly reported from Cox in 19 Eng. Rep., 601.

[2 Queen's Bench Division, 417.]

April 28, 1877.

[CROWN CASE RESERVED.]

*THE QUEEN V. TUCKER.

[417]

Musie—Dancing—Entertainment of like kind—Skating Rink—Band of Music—25 Geo. 2, c. 36, s. 2.

The defendant kept a skating rink within twenty miles of London. The rink was inclosed by a wall, and was partly roofed with canvas and partly open to the air. It was open for skating in the daytime and in the evening. In the daytime there was no music. In the evening a band played operatic and dance music while the skaters skated. The defendant had no license under 25 Geo. 2, c. 36:

21 ENG. REP.

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Held, that the defendant might properly be convicted of keeping a place for public entertainment of a like kind to music and dancing without a license.

Seemle, he might also be convicted of keeping a place for public music without a license.

CASE stated by the chairman of the Surrey quarter sessions.

At the general quarter session for the county of Surrey, on the 2d of January, 1877, John Mann and Robert Tucker were tried on an indictment of which, so far as material, the following is a copy :—

Surrey, to wit: The jurors for our Lady the Queen, upon their oath, present that John Mann and Robert Tucker, on the first day of October in the year of our Lord one thousand eight hundred and seventy-six, and on divers other days between that day and the day of taking this inquisition, in the Blackfriars Road, in the parish of St. George the Martyr, Southwark, in the said county of Surrey, and within twenty miles of the cities of London and Westminster, unlawfully did keep and maintain a certain place for public dancing and music, situate in the said road and parish aforesaid, and within twenty miles of the cities of London and Westminster, without a license had for that purpose from the last preceding Michaelmas quarter sessions of the peace for the county aforesaid, signified under the hands and seals of four or more of the justices there assembled at such sessions according to the directions of the statute in such case made and provided, the said dancing and music not being lawfully exercised and carried on under or by 418] virtue of any letters patent, *or license of the Crown, or license of the Lord Chamberlain of Her Majesty's household, to the great damage and common nuisance of all the liege subjects of our said Lady the Queen, contrary to the statute in such case made and provided, and against the peace.

Second count: For keeping and maintaining a certain place for public music without a license.

Third count: For keeping and maintaining a certain place for public entertainment of a like kind to an entertainment for public music and dancing without a license.

There were other counts, which for the present purpose are not material.

From the evidence it appeared that the defendant Tucker kept a skating rink in the Blackfriars Road, in the parish of Saint George the Martyr, Southwark, in the county of Surrey, and therefore within twenty miles of the cities of London and Westminster, as defined by the 2d section of 25 Geo. 2, c. 36, intituled "An Act for the better preventing thefts and robberies, and for regulating places of public

entertainment, and punishing persons keeping disorderly houses," without a license from the last preceding Michaelmas quarter sessions of the peace for the said county, "for publick dancing, musick, or other publick entertainment of a like kind," or by virtue of letters patent, or license of the Crown, or the license of the Lord Chamberlain.

The rink was inclosed by a high wall, and was partly covered by a canvas roof, and was partly open to the air.

An orchestra was built, and there was a band of six persons, who performed upon two violins, a harp, a double bass, a cornet, and a flute. Selections of operatic and dance music were played while the people skated on Plimpton's roller skates. The rink was open to the public for some hours during the day, and also at night, from 7 p.m. to 10 p.m. No music was played during the day, but at night the band played between 7 and 10 p.m. About fifty persons were present, some of whom were skating, and some were sitting around the rink. There was no way into the rink except through a turnstile. Each person was charged 1s. on admission, and 6d. for the use of the skates. The accompanying handbill was distributed inside and outside the building:—

SOUTH METROPOLITAN SKATING RINK.

Temperance Hall,
Blackfriars Road,

Next to Peabody's Buildings.

Now Open,

From 10.30 a.m. to 1 p.m., 2.30 to 5.30, and from 7 to 10 p.m.

Admission

One Shilling.

Plimpton Skates, 6d.

Long's Surrey Band

will be in attendance each evening, and discourse some of the choicest selections of Operatic and Dance Music, including the celebrated Shadow Dance, so suitable for the Skating Rink.

There was no case against the defendant Mann, and the chairman therefore directed the jury to acquit him.

It was contended by counsel that the music was not a main part of the entertainment, but only subsidiary to the skating: *Guaglieni v. Matthews* ('). That skating was not dancing within the statute. Nor did the entire performance in any sense come within the words of the above statute as

(') 34 L. J. (M.C.), 116.

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being a public entertainment of a like kind, i.e., to public dancing or music.

On the part of the prosecution, the case of *Hall v. Green* (1) was relied on as showing that the music need not be a principal or essential part of the entertainment.

In explaining the indictment to the jury, the chairman left it to them to say whether music was the main part of the entertainment or only subsidiary thereto, whether skating with music in the manner described by the witnesses and in the published bill was or was not dancing and music within the meaning of the statute, or if not, whether it was or was not a public entertainment of a like kind to public dancing or music.

The jury found the defendant guilty on the first and third counts of the indictment.

Counsel on behalf of the defendant objected that skating 420] was *not dancing, and that the evidence did not disclose any entertainment within the meaning of the statute.

Judgment was respited for the purpose of taking the opinion of the Court for the consideration of Crown Cases Reserved on these objections. If the court should be of opinion that the objections of counsel for the defendant were valid, the conviction was to be quashed, if not, the conviction was to be affirmed.

Lane, for the defendant: The conviction on the first count, which is for keeping a place for "public music and dancing," cannot stand. Skating is not dancing. And music is only within the section when it forms an independent and primary part of the entertainment, not when it is merely subsidiary to something else: *Guaglieni v. Matthews* (2). Here the music is as completely subordinate to the skating as it was in that case to the equestrian exercises. Moreover, by acquitting on the second count, the jury have negatived the existence of music as a substantive entertainment. Nor can the conviction on the third count be sustained; for the entertainment is not of a like kind with music and dancing. To see what is of a like kind, within the meaning of the statute, it is necessary to consider the mischief which the statute was intended to meet. The object, as appears from the preamble, was to check crime by prohibiting entertainments of a class likely to prove dangerous to morals. Skating, which is used as a mere exercise, is not a thing of the same kind with public dancing, from the point of view of the statute.

(1) 9 Ex., 247; 23 L. J. (M.C.), 15.

(2) 34 L. J. (M.C.), 116.

Besley (*Tickell* with him), for the prosecution: The defendant was rightly convicted on the first count. The words of the statute are in the disjunctive; and the place was kept for music, although for skating also. The decision in *Guaglieni v. Matthews* (') was wrong. Music is not the less within the section because it is a subordinate part of the entertainment. [He cited *Bellis v. Beal* ('); *Gregory v. Tuff's* ('); *Gregory v. Tavernor* ('); *Hall v. Green* ('); *Frailing v. Messenger* ('); *Garrett v. Messenger* (').]

*COCKBURN, C.J.: Whatever we may think of the [421 merits of this legislation as applied to such a case as the present, we must administer the law as we find it. According to the act, "any house, room, garden, or other place kept for publick dancing, musick, or other publick entertainment of a like kind," in or within twenty miles of London or Westminster, without a license, is to be deemed a disorderly house or place.

The jury have convicted the defendant on the first count of keeping a place for public dancing and music. Now rinking may, no doubt, take the form of dancing, but there is no evidence that it did so here. Therefore the conviction cannot be supported on the ground of dancing. But the count also charges music; and I think that part of the charge is proved. A difficulty, however, arises upon this point. The jury must have convicted on the first count on the ground that they thought rinking was dancing; for they have acquitted the defendant on the second count, which is for music alone, a count on which they ought in my opinion to have convicted.

I am not prepared to overrule the decision in *Guaglieni v. Matthews* ('). It is not necessary either to affirm or question it. That decision only applies where the music is merely subsidiary to something else which forms the real substance of the performance. It does not apply where the music forms an independent attraction, and an integral part of the entertainment. And that it did so here is shown by the fact that the skating went on without music in the daytime, and with it only in the evening.

As however the jury have acquitted on the charge of music in the second count, and so shown in what sense they meant to convict on the first count, I think it would not be safe to affirm the conviction on that count.

The third count charges the defendant with keeping a

(') 34 L. J. (M.C.), 116.

(') 2 Esp., 592.

(') 6 C. & P., 271.

(') 6 C. & P., 280.

(') 9 Ex., 247; 23 L. J. (M.C.), 15.

(') 16 L. T. (N.S.), 332.

(') 16 L. T. (N.S.), 414.

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place for an entertainment of a like kind with music and dancing. Rinking may or may not be similar to dancing; and when it takes place to the accompaniment of music it becomes of a like kind with dancing to music.

It has been said that the case is not within the mischief of the statute. But I do not know that that is so. Such a 422] place *kept open late at night might give rise to the evils which the statute was intended to repress.

It is sufficient for us to decide that where rinking is combined with music it is within the statute.

MELLOR, J.: I agree with all that my Lord has said, except that I question whether we ought not to affirm the conviction on the first count as well as on the third.

GROVE, J.: I am of the same opinion as to the third count. Rinking may be analogous either to skating or to dancing. When it takes place in a room, and to music, I think it of the same kind with dancing; if not, I can imagine nothing that is. If the first count had stood alone, I should have been prepared to affirm the conviction upon it also. But having regard to the acquittal on the second count, I think such an affirmance, though technically correct, might, in effect, pervert the finding of the jury.

LINDLEY, J.: On the third count I feel no doubt whatever. As to the first count, for the reasons which have been already stated, I should not be prepared to affirm the conviction.

HAWKINS, J.: I agree with my Lord upon all points.

Conviction affirmed.

Solicitors for prosecution: *Beard & Son.*

Solicitor for defendant: *P. B. Cunningham.*

[2 Queen's Bench Division, 423.]

April 27, 1877.

[IN THE COURT OF APPEAL.]

423] *METCALFE V. THE BRITANNIA IRONWORKS COMPANY (').

Charterparty—Freight—Voyage not completed—Freight pro rata.

A cargo of railway bars was shipped under a charterparty to be carried from a port in England to Taganrog, in the Sea of Azof, or so near thereto as the ship could safely get, freight to be paid in London against certificate of right delivery of cargo. On the arrival of the ship, on the 17th of December, at Kertch, which was as near as he could then get to Taganrog, the captain found the sea blocked with ice till the ensuing spring; and he proceeded to discharge the cargo, notwithstanding the opposition of the charterer's agent. By the bill of lading the cargo was deliver-

(') Affirming 18 Eng. Rep., 83.

able at Taganrog to a Russian railway company, "freight and other conditions as per charterparty." As no bill of lading was produced at Kertch, the captain placed the cargo in charge of the custom house authorities; and they on the 27th of December delivered it to the agent of the railway company on his producing written authority from the company, together with copies of the charterparty and bill of lading, notwithstanding the captain's claim to retain it until the freight was paid. The agent of the company gave a written acknowledgment that he had received the cargo on the power of the charterparty and bill of lading passed to him by the railway company. The ship then sailed from Kertch. The shipowner having sued the charterers for freight:

Held, affirming the judgment of the Queen's Bench Division, first, that the plaintiff was not entitled to full freight, as the delivery at Kertch was not a delivery within the charterparty; secondly, that the plaintiff was not entitled to freight *pro rata*, as no new contract for such freight had been made.

CASE stated without pleadings ('). The material facts were as follows:—

By a charterparty made in October, 1873, between the plaintiff, owner of the steamship Meredith, and the defendants, it was agreed that the ship should load at Middlesborough-on-Tees a cargo of railway iron, and proceed to Taganrog, or as near thereto as she might safely get, and deliver the same afloat on being paid freight at a given rate per ton. The ship accordingly went to Middlesborough, and there took on board the railway iron from the agents of the defendants, and proceeded on her voyage. She reached Kertch, at the entrance of the Sea of Azof, on the 17th of December, and then found the buoys removed and the navigation to Taganrog closed for the winter. The captain thereupon proposed to discharge the cargo at Kertch, and made a protest in which he *said that he determined [424] to do so, Kertch being the nearest port to Taganrog which the steamer could safely approach; and he gave notice accordingly to Messrs. Berthold & Co., the agents at Taganrog for the defendants, and also for a Russian railway company, the consignees of the iron. Messrs. Berthold & Co., by telegram, told the captain that if he discharged at Kertch he would be liable for infraction of the charterparty. The captain, however, proceeded to discharge the iron, and delivered it to the custom house authorities at Kertch. Soon afterwards an agent for the consignees producing the bills of lading, and acting under a power of attorney from the railway company, obtained possession of the iron from the custom house authorities without payment of any freight, and notwithstanding the captain's claim for freight, giving the captain a simple receipt for the iron. The cargo was in due course received by the company.

The shipowner brought an action to recover the freight,

(') The case will be found fully set out in 1 Q. B. D., 613; 18 Eng. Rep., 83.

and the Queen's Bench Division gave judgment for the defendants (*), Mellor and Quain, JJ., holding that the plaintiff was not entitled to any freight; Cockburn, C.J., dissenting and holding him entitled to freight *pro rata*.

The plaintiff appealed.

On the argument before the Queen's Bench Division it was supposed and assumed that Kertch was about thirty miles from Taganrog. On the appeal it was stated and admitted that Kertch is distant from Taganrog 300 miles by sea and 700 miles by land; that there was no railway communication between these places, and that the means of land carriage were very defective.

Cohen, Q.C. (Beresford with him), for the plaintiff, cited *London and North Western Ry. Co. v. Bartlett* (*), *Cork Distilleries Co. v. Great Southern and Western Ry. Co.* (*), and *The Soblomsten* (*).

Watkin Williams, Q.C. (Hollams with him), for the defendants, cited *Luke v. Lyde* (*).

Cohen, Q.C., in reply.

425] *LORD COLERIDGE, C.J.: In this case there was a difference in the court below, upon the question whether the plaintiff was entitled to freight *pro rata* for so much of the voyage as had been completed. I think that there was not any difference in the court below upon the question whether the whole of the freight was due. Those are the two questions before us.

The facts are few and simple. The ship was to take iron railway bars from Middlesborough to Taganrog, or as near thereunto as she might safely get; one third of the freight was to be paid on signing the bill of lading, and the balance in cash in London against a certificate of right delivery of cargo. The ship got to Kertch, which is at the entrance of the Sea of Azof, Taganrog being at the other end of the sea, and the distance between them is now allowed to be about 300 miles by sea, and 700 by land. It is admitted that the captain was right in stopping at Kertch; the buoys had been taken up, and practically the navigation of the Sea of Azof was closed for the winter; therefore, as I understand it, there was an absolute physical obstruction by means of ice—at all events, there was enough to justify the captain in stopping at Kertch. He then proceeded to discharge the cargo, and in a protest he states what are the circumstances.

(*) 1 Q. B. D., 613.

(*) Law Rep., 1 A. & E., 293.

(*) 7 H. & N., 400; 31 L. J. (Ex.), 92.

(*) 2 Burr., 882; 1 W. Bl., 190; S. C.,

(*) Law Rep., 7 H. L., 269.

nom. *Luke v. Lloyd*.

[The Lord Chief Justice then read the protest (').] This, I apprehend, is a clear statement that the captain considered the voyage at an end within the terms of the charterparty, and so discharged the cargo at Kertch as being the nearest point to Taganrog to which he could get. The consignees at once gave him notice that he was not fulfilling the charterparty, and that though they could not prevent him from discharging the cargo, they did not accept it. The cargo was, however, landed and remained some time in the keeping of the custom house authorities. Then an agent of the consignees came to Kertch with a power of attorney from the consignees, and required the Russian authorities to give up the cargo, which was done, though the captain required them to retain it until the freight was paid. In order to obtain possession of the iron, the agent of the consignees gave the captain a receipt. It is said, first, that the plaintiff is entitled to the whole freight; and, secondly, that though this state of things may not justify the *plaintiff in [426 demanding the whole freight, yet it does justify the proposition that the plaintiff is entitled to freight *pro rata*.

On the first point the court below decided unanimously against the plaintiff, and we are of opinion that the court below was clearly right. It is not necessary to say more than that the obstruction was only temporary, and is such as must be incident to every contract for a voyage to a frozen sea, and it cannot be said that in all these contracts the words "at that time," or "then and there," are to be inserted after the words "as near thereto as the ship can safely get."

But then it is contended that, at all events, the plaintiff has a right to freight *pro rata*. That right, as I understand it, must depend on the rule laid down by a great authority, Baron Parke, in *Vlierboom v. Chapman* (*). He says, "The true principle upon which this description of freight is due is that a new contract may be implied to pay it from the acceptance by the consignee of his goods delivered at an intermediate port instead of the destined port of delivery." Therefore to render freight due it must be shown either that there has been a presumptive fulfilment of the old contract, or that a new contract between the parties must be implied, for two persons other than the original parties could not make any modification of the original contract. The learned judge then goes on to state the doctrine from Mr. Justice Story's edition of *Abbott on Shipping*, p. 329, that to justify a claim for *pro rata* freight there must be a voluntary ac-

(') 1 Q. B. D., at p. 15.

21 ENG. REP.

(*) 13 M. & W., 230, at p. 238.

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ceptance of the goods at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with. That must mean "dispensed with by some one who had authority from the original consignor," and in that case there was no third party, the consignor and the consignee being in fact the same person, so that the statement was quite accurate. Baron Parke goes on to say that there was in that case no reasonable ground for inferring a new contract, "for the shipowner was not ready to carry forward to the port of destination in his own or another ship, and consequently no inference could arise that the shippers were willing to dispense with the further carriage, and accept the delivery at the intermediate instead of the destined port," meaning 427] *clearly that the contract to be implied must be between the same parties as those who made the original contract.

These being the principles upon which freight *pro rata* can be earned, how do the facts here apply? In the first place, there was no acceptance amounting to a voluntary acceptance by the consignee at the substituted port. The goods were finally discharged against the protest of the consignees, and they had to consider what to do, whether to leave them alone or to take them at this place, which they must do if they were to get them at all. They took them, and the captain not attempting to qualify his absolute discharge, said in fact that he had completed the voyage and claimed the freight. But he had no right to do this when he had not fulfilled the contract; and taking the goods in spite of this claim cannot amount to a voluntary acceptance under the charterparty, or to making a new contract to pay freight. The question whether the consignees could make an agreement which would bind the consignor does not arise here; and the facts of this case when properly looked at do not come within the conditions upon which alone *pro rata* freight is given. It was suggested in the court below, that upon some general principle of the law-merchant, quite apart from an express contract, freight *pro rata* is always due where the voyage has been partly performed, and the decision of Lord Mansfield in *Luke v. Lyde* (') was given as the authority. I do not consider it necessary to discuss that authority, for I do not read the facts of this case as I understand the Lord Chief Justice to have read them. In my opinion there was here no dispensation with further carriage or voluntary taking of the goods, and I must

(') 2 Burr., 882.

respectfully differ from the conclusions of fact, if they are conclusions, of the Lord Chief Justice. In some parts of his argument he seems to put forward a sort of general equity that a shipper should pay *pro rata* for so much of the carriage as he has had the benefit of. This appears to me to have been founded upon the supposition that the two ports were so near as to make it of little consequence at which the goods were delivered, and to bring the case within the authority of those cases where there was practically no difference between them. It seems to have been assumed that Kertch and Taganrog were very near. This was hastily *conceded by both sides, and the court adopted the [428 concession and proceeded on a wrong state of facts.

Upon these grounds, therefore, it appears to me that the judgment of the majority in the court below is correct, and ought to be affirmed.

BRAMWELL, L.J.: I am of the same opinion. The plaintiff cannot show that he has performed the conditions precedent to his right to recover under the charterparty, and he must therefore, in order to succeed, show either a dispensation or a new contract, whether he seeks to recover the whole freight or freight *pro rata*.

I think that the consignees might have dispensed with the full performance of the contract, if it had suited them, when the ship touched at Kertch, to have the iron landed there and carried no farther. I think that is so, but I do not affirm it definitely. The plaintiff must, however, make out his case in point of fact, and it is for him to show that he has performed his contract, or that there has been a dispensation. To my mind, there is no evidence that the consignees dispensed with the voyage to Taganrog. The captain landed the iron under a mistaken notion that he had a right to land it, and need not carry it farther. He claimed the freight, and from first to last showed no intention to come back in the spring or to send on the iron by another ship, but claimed a right to leave the goods at the risk of the consignees. I agree that by stopping at Kertch he had not broken the contract, because he could not get any farther, but I think that landing the goods in that way was a breach of the contract; nor is it necessary to refer to *Hochster v. De La Tour* (') and similar cases for authority on that point. But, at all events, when he had landed these goods, and had said, "There are the goods, and you must pay the freight," he certainly gave the consignees a right to take them away; in fact, he obliged the consignees to take them.

(') 2 E. & B., 678; 25 L. J. (Q.B.), 455.

It was argued that the captain had no authority to do this; but that does not affect the case.

As to the argument that the consignees took them voluntarily, no doubt they did so in one sense, just as a man 429] turned out of a *hackney cab instead of being carried to the end of his journey, would probably walk away, though of course he might sit down on a doorstep and wait for the cabman to carry him on. No doubt the consignees might have left the goods there, but they took them away because they could not help it. The telegram indicates no consent, nor does the receipt, and throughout the case there is an entire absence of any sign of acquiescence. What reason was there why the consignees should say, "You cannot get further than Kertch; we do not care; we shall have to pay the carriage from Kertch, but still we will pay you the whole freight." Why should they not have said to the captain, "Go away if you choose, but you must not ask us to pay the full freight, as we shall have to carry the cargo to Taganrog?" What the consignees did might not have been very generous, but it was very discreet. They said, "Land your cargo if you like, but take the consequences." It is clear that there was no dispensation from the full performance of the contract.

As to the claim for freight *pro rata*, that can only be made under a new contract. But certainly there was no new contract with the charterers, and the new contract, if any, was with the consignees, who had no power to bind the charterers. But, in my opinion, there was no new contract; the observations I have made as to the full performance of the contract not having been dispensed with, show that there was no new contract. The argument that there was, put shortly, is this: It is said that, because the captain broke the old contract, there must be a new contract implied. I do not blame the captain for breaking the contract; he was in a difficult position, and there was no *mala fides* on his part; but still he broke it, and there was no new contract to pay freight *pro rata*, and if there was, it did not bind the charterers.

Upon these grounds, my opinion is that the judgment of the majority in the court below ought to be affirmed. It is due, however, to the Lord Chief Justice to show why I do not agree with his judgment. He seems to have proceeded upon two grounds: one, that a new contract ought to be implied, but he does not advert to the difficulty that the 430] consignees had no power to *make a contract which

would bind the charterers. He refers to many cases where the shipowner has been prevented from performing the contract without any fault on his part, and he says⁽¹⁾, "Ought we not to imply an undertaking to pay for the carriage of the goods as far as it has gone?" The answer I give is that that is not the present case. Whether we ought in any of the cases put by him to imply a new contract, is a difficult question to answer. In some no doubt we ought, but there are many cases in which we ought not. The Lord Chief Justice, further, seems to have considered that the consignees compelled the master to give them the cargo, but on the evidence I have, with all due respect, come to a different conclusion. He further says that they ought to have given the shipowner a *locus penitentia*, and not to have prematurely seized the cargo; but suppose that, instead of this being iron, it had been corn or sugar, or any such cargo, could the shipowner then expect a *locus penitentia*, and ought the consignees to leave the goods to perish? It seems to me that the law cannot be so, and that the consignees were obliged to act as they did. It is said that these cases are hard, and that we ought always to imply such a contract as they ought to have made; but if the parties choose they can always provide for this case in the charterparty, and I should be much surprised to see a clause inserted, "If the captain breaks the charterparty, freight shall be paid *pro rata*," and yet that is what we are asked to suppose the charterers to have acceded to. In my opinion the judgment appealed against is right.

BRETT, L.J.: The shipowner here claims full freight, or, if not, freight *pro rata*, but it appears to me that he is not entitled to either. The charterparty is in the ordinary form, which has often been construed, and we must hold, as a condition precedent to the recovery of anything as freight under the charterparty, that the goods shall have been carried to the port of destination, or as near thereto as the ship can safely get. Nothing, therefore, can be recovered under this charterparty unless the agreement has been performed, or the performance has been waived by the charterers or *by some one authorized by them. Now, construing [431] this charterparty as well as we can, it is obvious that the condition has not been fulfilled; nor was it waived by the charterers, nor, for reasons already given, can we hold that it was waived by the consignees. It seems to me clear that the consignees only took the goods because the captain had left them, and had declared that he would not carry them

(1) 1 Q. B. D., at p. 620.

C. Russell, Q.C., opposed the motion to enter judgment for the plaintiff, and showed cause against the order *nisi* for a new trial.

457] *The rest of the argument is sufficiently mentioned in the judgment of the court.

The following authorities were cited: As to the warranty of seaworthiness implied by law in marine insurance: *Gibson v. Small* (1); *Quebec Marine Insurance Co. v. Commercial Bank of Canada* (2); and upon the carriage of goods by sea: *Lyon v. Mells* (3); *Tarrabochia v. Hickie* (4); as to the liability of carriers of passengers for unknown defects: *Readhead v. Midland Ry. Co.* (5); and of persons hiring out buildings with secret defects: *Francis v. Cockrell* (6); as to the effect of a description in a charterparty of a vessel's class: *Hurst v. Osborne* (7); *Routh v. Macmillan* (8); as to the meaning of the word "voyage": *Thompson v. Taylor* (9); *Crow v. Falk* (10).

Cur. adv. vult.

Feb. 9. The judgment of the Court (Mellor, Lush, and Field, JJ.) was delivered by

FIELD J. In this case there were two motions on the part of the plaintiff: one for judgment under Order XL, Rule 2, and the other for a new trial on the ground of misdirection. The action was tried before Lush, J., at the Liverpool winter assizes of 1875. It was brought to recover the sum of £500, being the value of a cargo of cement shipped by the plaintiff on board the *Iola*, of which the defendants were the owners, and which foundered with the cargo on board in St. Andrew's Bay, on the 21st of May, 1875. The cement was shipped under a charterparty, dated the 14th of May, 1875, and made between the plaintiff and the master of the ship (which was then at the port of Sunderland), and by the terms of it the ship was to "proceed to a good and safe place or places in the river or South Dock 458] as ordered, and there take on board" *the cargo in question, and proceed therewith to Dundee to discharge. It appeared at the trial that at the time of the execution of the charterparty, the plaintiff ordered the ship to load at a wharf in the river (which was part of the port of Sunderland), at which wharf cement is often loaded, but at which all vessels

(1) 4 H. L. C., 353.

(2) Law Rep., 8 P. C., 234.

(3) 5 East, 428.

(4) 1 H. & N., 183; 26 L. J. (Ex.), 26.

(5) Law Rep., 4 Q. B., 379.

(6) Law Rep., 5 Q. B., 501. See the comments upon *Readhead v. Midland Ry.*

Co. and Francis v. Cockrell in *Randall v. Newson*, ante, p. 102, at pp. 110, 111, 112.

(7) 18 C. B., 144; 25 L. J. (C.P.), 209.

(8) 2 H. & C., 750; 33 L. J. (Ex.), 38.

(9) 6 T. R., 478.

(10) 8 Q. B., 487.

of necessity ground on the mud at every low tide. The ship having proceeded to the wharf in obedience to her orders took the cement on board on the 19th and 20th of May, in the afternoon of which latter day (the master having signed a bill of lading of that date in the usual form in pursuance of the ordinary clause in the charterparty requiring him so to do without prejudice to the charter) she was towed out to sea and set sail on her voyage. Her pumps were sounded on starting, and she was found to have made about eighteen inches of water; she was then pumped out, but in about an hour she was found to have made two and a half feet of water, and in consequence of this a consultation was held between the master and the crew as to the proper course to be adopted, and it was agreed that it was better to proceed to her destination, as the wind was fair and the voyage not very long, rather than return to port with a foul wind. She accordingly proceeded on her voyage, the pumps being kept at work, and had reached St. Andrew's Bay within six miles of her place of discharge, when the water having overpowered her pumps, she foundered about a mile and a half from the shore.

Under these circumstances, it was contended at the trial on the part of the plaintiff that the loss of his cement was caused by the ship not being seaworthy, in breach of a warranty on the part of the shipowner that she should be so, which the plaintiff alleged was necessarily to be implied from the charter. It was clear that the ship was not in fact seaworthy at the time she set sail, and that as she was found to be seaworthy when she commenced taking in cargo, she must have received damage in the course of loading. The defendant contended that the implied warranty was thereupon satisfied, and that the whole duty of the shipowner thenceforth was to take due and reasonable care, and that under the circumstances of the case the master had no reasonable means of ascertaining the existence of the defect which rendered her unseaworthy, and was therefore not guilty of any want of care in *setting sail in her then [459 condition. These propositions were denied by the plaintiff, who further set up that, if even they were true, the master was further guilty of negligence in proceeding on his voyage instead of returning to port after he had discovered the unseaworthiness of his ship. Evidence was given at the trial on both sides in support and contradiction of these propositions, and at the close of the evidence, Lush, J., left the following questions to the jury: first, was the *Lola* seaworthy at the time she commenced taking in the cargo?

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secondly, were the defendants guilty of negligence in sending her to sea in the condition in which she was? thirdly, was the captain guilty of negligence in not returning to port? In answer to these questions, the jury found, first, that she was seaworthy at the time she commenced taking in the cargo; secondly, that the defendants were not guilty of negligence in sending her to sea in the condition in which she was; and, thirdly, that the captain was not guilty of negligence in not returning to port. Upon these findings the learned judge gave the plaintiff leave to move to enter judgment for £500, if such a warranty as was alleged was to be implied, and if it applied under the circumstances of the case, and the plaintiff's motion for judgment was made under this leave.

Upon the argument before us, Mr. Herschell in support of it relied upon the rule of law laid down by this Division in the case of *Kopitoff v. Wilson* (') (decided since the trial of this cause) that "in whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary, the shipowner is by the nature of the contract impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or in ordinary language is seaworthy, that is, fit to meet and undergo the perils of the sea and other incidental risks, to which she must of necessity be exposed in the course of the voyage;" and he contended that although the jury had found that the *Iola* was seaworthy at the time of her proceeding to the wharf in question, her admitted unseaworthiness at the time of her sailing from the wharf was a breach of this warranty, which entitled him to recover. He also contended that a similar warranty was to be implied from the 460] bill of lading, which was made on the 20th of May just before she sailed.

Mr. Russell, on the part of the defendants, did not dispute the principle laid down in *Kopitoff v. Wilson* ('); but relying upon the finding of the jury that the ship was seaworthy for the voyage when she proceeded to the wharf, he said that the warranty attached and was exhausted at that time, the proceeding from the spot in the port of Sunderland, at which she lay at the time of the execution of the charter, to the loading-berth being, he said, an act done under the charter, which formed the commencement of the period at which the warranty attached; and he then argued, in accordance with the English rule of law on that head, that if

(') 1 Q. B. D., 377, at p. 380.

the warranty was thence once complied with, subsequent unseaworthiness not caused by the negligence of the master did not give the shipper any right of action. He was unable to cite any authority, directly applicable to the case of a contract of carriage, for fixing the application of the warranty within the above rule at this particular stage, the cases he referred to in support of his contention being in truth (as was observed during the argument) cases in which the court in construing a particular instrument put a particular construction upon the meaning of the word "voyage," as used with regard to the excepted perils under the particular circumstances of the case: *Barker v. McAndrew* (¹); *Bruce v. Nicolopulo* (²), or decided that upon the construction of the instrument then under discussion the warranty of class was limited to a warranty or representation at the time of the using the words, namely, the execution of the charterparty, and did not continue throughout the voyage. He contended, however, upon principle that the warranty should be held to attach at that period, because the proceeding from where the ship lay at the time of the execution of the charterparty to the loading berth as ordered, was the first act done under the charter, and was equivalent to the commencement of the risk, which, in cases in which an analogous warranty is implied between the underwriter and the assured, is the point of time at which the warranty is to be complied with.

*But we think upon a reference to the principle [461 laid down in those cases and having regard to mercantile convenience, which in construing mercantile matters is a thing always to be regarded, that this contention cannot be supported. Let us first consider what is the nature and object of the warranty of seaworthiness, and under what circumstances it is implied. The merchant has goods which he considers he can dispose of at a profit at a distant port, and having selected his home port from which to dispatch them, he engages or delivers his goods to a ship upon which he may with reasonable safety effect their transport to their place of destination. Having made his contract of carriage, and the law having implied for him the warranty of the ship-owner that the ship is fit to meet the ordinary perils of the voyage, the merchant then insures himself against those perils by the ordinary marine policy. Now nothing can be clearer than that upon such a policy the warranty of seaworthiness for the voyage, which he as the assured comes

(¹) 18 C. B. (N.S.), 759; 34 L. J. (C.P.), 191. (²) 11 Ex., 129; 24 L. J. (Ex.), 821.

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under in like manner by implication to the underwriter, is a warranty that the ship is or shall be seaworthy for the voyage at the time of sailing on it. That is the point at which the risk commences, at which the warranty attaches, and is by the law of England exhausted. No degree of seaworthiness for the voyage at any time anterior to the commencement of the risk will be of any avail to the assured, unless that seaworthiness existed at the time of sailing from the port of loading. As, therefore, the merchant in a case like the present would not be entitled to recover against his underwriter by reason of the breach of warranty in sailing in an unseaworthy ship, it would follow that, if the warranty to be implied on the part of the shipowner is to be exhausted by his having the ship seaworthy at an anterior period, the merchant would lose that complete indemnity by means of the two contracts taken together, which it is the universal habit and practice of mercantile men to endeavor to secure. Seaworthiness is well understood to mean that measure of fitness which the particular voyage or particular stage of the voyage requires. A vessel seaworthy for port and even for loading in port, may be, without any breach of warranty, whilst in port unseaworthy for the voyage, *Annen v. Woodman* ('); but if she put to sea in that [462] state the warranty is broken. Now the *degree of seaworthiness which the merchant requires is seaworthiness for the voyage, and surely the most natural period at which the warranty is to attach is that at which the perils are to be encountered which the ship is to be worthy to meet. The ship is, during her stay in port, and whilst loading, and when she sets sail on her voyage, in the custody and possession and under the control of the master and crew, and it is most reasonable and convenient to impose upon those, who have the best means of knowing, the duty of ascertaining her condition at that critical time when she is about to meet the perils, which it is the object of all parties that she should be prepared to meet.

This being our view of the case, it is not necessary for us to express any opinion upon the subsidiary questions raised by Mr. Herschell; but with reference to the motion made by him for a new trial on the ground of misdirection, in regard to the question of the alleged negligence of the master in not returning to port upon the discovery of the vessel's leaking, we think it right to add that we have read carefully the evidence, the summing-up of the learned judge, and the comments of counsel by which the evidence was

(') 3 Taunt., 299.

pointed and shaped, and we see no reason whatever, looking at the conduct and course of the trial, to doubt but that the learned judge quite sufficiently explained to the jury, and that the jury fully understood, what was the question which they had to decide.

The result, therefore, will be, that under Mr. Herschell's motion we enter judgment for the plaintiff for the sum of £500, and discharge his order for a new trial.

Judgment for the plaintiff.

Solicitors for plaintiff: *Maples, Teesdale & Co.*, for H. B. & C. Wright, Sunderland.

Solicitor for defendants: *J. W. Hickin*, for Ralph Simey, Sunderland.

[2 Queen's Bench Division, 468.]

April 16, 1877.

[IN THE COURT OF APPEAL.]

**Ex parte A. R. SHAW.*

[463]

In the Matter of THE DIAMOND ROCK BORING COMPANY, LIMITED.

Company—Rectification of Register—Jurisdiction of Court under s. 35 of Companies Act, 1862 (25 & 26 Vict. c. 89)—Question of Title—Default in Company.

In order to give jurisdiction to the court or judge to order rectification of the register of shareholders in a company, under s. 35 of the Companies Act, 1862 (25 & 26 Vict. c. 89), it is not necessary that there should be actual default in the company.

It is a matter of discretion whether the court or judge will exercise the summary jurisdiction; and in a complicated or doubtful case the jurisdiction ought not to be exercised; but when the legal title in the applicant is clear the order ought to be made.

S. employed A. to buy for him forty shares in a limited company. A. negotiated for the purchase with P., who was the registered holder of forty shares. S. paid A. the purchase-money for the shares. P. executed a transfer to S., and forwarded it to the secretary of the company, together with the scrip, and the secretary wrote on the transfer, "certificates lodged at company's office," and returned it to P., retaining possession of the scrip. P. forwarded the transfer to A., and he sent it to S., who executed the transfer and returned it to A., in order that he might get S.'s name put upon the list of shareholders, the articles of association requiring the duly executed transfer to be lodged at the chief office of the company before the transferee could be registered. A. acted throughout for both parties, but he did not pay over the price to P., and falsely told him that the purchaser would not complete; upon which P. demanded back the transfer, and A. cut off P.'s signature from the transfer and sent the signature to P., and afterwards absconded. S. demanded to have his name put upon the register as the owner of the forty shares, for which the scrip had been deposited with the company; but the company refused, at the instigation of P. On affidavits disclosing these facts, S. applied, under s. 35 of the Companies Act, 1862 (25 & 26 Vict. c. 89), for a judge's order to rectify the register by inserting S.'s name as the holder of the forty shares. P. opposed the summons; the

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company appeared, but offered no opposition. The order having been made as prayed:

Held, by the Common Pleas Division and Court of Appeal, that, S. having paid P.'s agent for the shares, and the transfer having been duly executed, S. had a legal title to the shares; that the judge had jurisdiction to decide the matter, if he thought right, and that he had exercised a proper judicial discretion in deciding and making the order.

[2 Queen's Bench Division, 485.]

May 8, 1877.

485] *ADNAM V. THE EARL OF SANDWICH.

Statute of Limitations (3 & 4 Wm. 4, c. 27, ss. 2, 3)—Fee Farm Rent—Discontinuance of Receipt—Payment of Rent by Person other than the Terre-Tenant.

Certain lands which were subject to a fee farm rent were, in 1812, conveyed upon a sale by the then owner to the plaintiff's predecessor in title. From 1812 down to 1872 the rent was paid by the vendor and his successors in title, notwithstanding the fact that they had ceased to have any interest in the lands. The persons who, during that period, claimed to be entitled to, and so received the rent, were ignorant of the conveyance of the lands to the plaintiff's predecessor in title. In 1872, the successor in title of the vendor refused to continue the payments of rent, and the defendant, as the owner of the rent, thereupon demanded payment of the rent from the plaintiff, and on her refusal to pay it, distrained upon the land for the arrears. The plaintiff thereupon replevied, claiming that the defendant's title to the rent was barred by discontinuance of the receipt of the rent, under 3 & 4 Wm. 4, c. 27, ss. 2, 3, on the ground that the payments of rent since 1812 not being by the terre-tenant, there had been no receipt of the rent within that act during such period:

Held, that there was no discontinuance of receipt of the rent; first, because the provisions of the statute only apply where there has been an omission by the party entitled to the rent to enforce his remedies for the payment with knowledge that the rent has not been paid, which was not the case with regard to the defendant or his predecessors in title; and, secondly, because under the circumstances it must be presumed that on the conveyance of the lands before mentioned there was some arrangement that the vendor should indemnify the purchaser against the rent, and the payments of rent from 1812 to 1872 were therefore made on behalf of the plaintiff and her predecessors in title; and that the defendant's title was therefore not barred.

SPECIAL CASE stated in an action of replevin. The facts sufficiently appear from the judgment.

Feb. 2. *H. Matthews, Q.C. (Bullen with him)*, for the plaintiff: This rent was a freehold rent service; a rent which is an incident of tenure, the liability to which falls upon the land, but not on any one personally: Co. Litt. s. 217, 143 b. At common law debt would not lie for it, but the remedy was by an assize of novel disseisin or mort d'ancestor. It has been decided that since the abolition of real actions, an action of debt will lie where the real action would have lain: *Varley v. Leigh* (*). *Thomas v. Sylvester* (*). But no case has decided that any alteration has
486] been *made in the nature of the rent, or that an

(*) 2 Ex., 446; 17 L. J. (Ex.), 289.

(*) Law Rep., 8 Q. B., 868.

action of debt will lie now where the real action would not have lain.

Rent service issues out of the land and denial of the rent was no disseisin of a rent service, as it was of a rent charge: Co. Litt. s. 237, 160 b. The primary remedy for mere denial of a rent service is by distress, and nothing amounted to a disseisin but something which operated by way of prevention of the distress. The real action did not lie for mere denial. There being no personal obligation on any one to pay, the terre-tenant who conveyed the land to another could not have authority to make any payment of rent for him. Consequently the payments made by the vendor of the land and his successors cannot be considered as payment of the rent. They were mere voluntary payments by a stranger. It follows that the receipt of the rent has been discontinued for more than twenty years, and by 3 & 4 Wm. 4, c. 27, ss. 2, 3, the defendant's title to the rent is barred.

[He also cited *Chinnery v. Evans* (1); *DeBeauvoir v. Owen* (2).]

J. Brown, Q.C. (*J. O. Griffiths*, Q.C., with him), for the defendant: The defendant and his predecessor in title never discontinued receipt of the rent, nor were dispossessed of it, so that the Statute of Limitations (3 & 4 Wm. 4, c. 27, ss. 2, 3) applied. A man can only be said to be dispossessed if another person gets into possession. This was not the case. Neither was there any discontinuance of the receipt. The defendant and his predecessors continued to receive as rent that which was paid as rent. The Statute of Limitations goes on the presumption that there is some laches on the part of the person entitled in not asserting his right. Here there was nothing of the sort. If the plaintiff's contention is correct, a rent might easily be lost by collusion between the vendors and purchasers of the land subject to it. Secondly, the facts raise the presumption that when the manor was sold there was some arrangement that the vendor should indemnify the purchaser against the rent. Such an arrangement is very common under similar circumstances. The fact of the payment by the vendor and his successors for so many years is not likely to have been by mistake. If this were so, the payments of rent were on behalf of the terre-tenant.

*[He cited *Belshaw v. Bush* (3); *Toft v. Stephen*- [487

(1) 11 H. L. C., 115.

(2) 5 Ex., 166; 16 M. & W. 547.

(3) 11 C. B., 191; 22 L. J. (C.P.), 24.

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son ('); *Woodcock v. Titterton* ('); *Smith v. Lloyd* ('); *Archbishop of Dublin v. Lord Trimleston* (').]

H. Matthews, Q.C., in reply, cited *Simpson v. Eggington* ('); *Coope v. Cresswell* (').

Cur. adv. vult.

May 8. The judgment of the Court (Mellor and Field, JJ.) was delivered by

FIELD, J.: This is a special case stated by consent. The action is in replevin, and is brought by the plaintiff, as the owner of a moiety of the manor of Sutton Courtney, against the defendant, who is heir male of the body of Edward, Earl of Sandwich, upon a distress taken by him for the recovery of two years' arrears of a fee farm rent of £80 8s. 11½d., claimed to be issuing out of the said manor of Sutton Courtney, under letters patent of King Charles I., dated the 9th day of September (A.D. 1628), and which fee farm rent was, by letters patent dated the 3d day of February, in the fifteenth year of King Charles II., granted to the said Edward, Earl of Sandwich, and his heirs male of his body. The circumstances under which the question submitted to us for decision arises are as follows: In the year 1801 William, Lord Craven, was the lord of the manor (which included the hamlet of Sutton Wick), and was also proprietor of lands within the said parish of Sutton Courtney and the hamlet of Sutton Wick, and by virtue of an inclosure act (passed in that year) for inclosing the open and common fields within the said parish and hamlet several allotments (amounting altogether to about 639 acres) were made to him. It was provided by the act that all such allotments should be subject to such and the same charges, payments, rents, and incumbrances as they would have been subject to in case the act had not been passed, and in consequence the allotments so made to Lord Craven if (as presumably is the case) they were parcel of the wastes of 488] the manor, remained liable to the said fee farm rent. After the making of the award under this act, and before the year 1812, Lord Craven sold some of the said allotments to different persons, and apparently to (amongst others) Francis Elderfield, who is mentioned hereafter, and in some way, not explained, some of these allotments have passed to and are now vested in the plaintiff. In the year 1812 Lord Craven by deed conveyed the manor of Sutton Court-

(1) 21 L. J. (Ch.), 129.

(2) 12 W. R., 864.

(3) 9 Ex., 562.

(4) 12 Ir. Eq., 251.

(5) 10 Ex., 845.

(6) Law Rep., 2 Ch., 112.

ney and all the land he had left in the parish and hamlet to Francis Elderfield, through whom the property so conveyed subsequently passed to and is now vested in the plaintiff. The conveyance to Francis Elderfield is dated the 17th of October, 1812, and it was a conveyance for a gross sum of £1,030 free from all incumbrances, and contained no reference to the rent in question. Notwithstanding, however, that Lord Craven and his successors in title had thus in and after the year 1812 ceased to hold any of the lands out of which the fee farm rent issued, they continued to pay the said rent to the defendant and his predecessors regularly down to the year 1872, but neither the defendant nor his predecessors had any notice of the conveyance or of the sale of the allotments. In February, 1874, in consequence of a question having arisen between the agents of the defendant and those of the present Earl of Craven as to the right of the latter to deduct the land tax from the amount of the rent, his agent for the first time informed the defendant's agent that Lord Craven had no estate or interest in the manor of Sutton Courtney, which he said had been sold in 1807, and he said that the payment after the sale for very many years by Lord Craven and his predecessor must have been made under a misapprehension as to their liability, and after suggesting the way in which it appeared to have arisen, he informed the defendant's agent that the payments had been made in error, and that reference must be had to the owner of Sutton Courtney (the present plaintiff) for the future payments. After some ineffectual correspondence with the Earl of Craven's advisers the receiver to the defendant applied to the plaintiff, as owner of the said manor, for payment of the two years' arrears of the said rent, amounting to £160 17s. 11d., now in question, and on the plaintiff's declining to pay and denying her liability, a distress was levied on the said manor on the 28th of May, 1875, whereupon the plaintiff replevied *and brought the [489 present action, and the question for our decision is whether, under these circumstances, the defendant is entitled to recover the said fee farm rent by distress.

Upon the argument before us the original title of the defendant and his predecessors in title up to the year 1812 to the rent in question was not disputed, but it was said that as by law the only remedy in case of non-payment of a rent in fee was against the terre-tenant before the abolition of real actions by an assize of novel disseisin, and since their abolition by an action of debt (*Thomas v. Sylvester* (1));

(1) Law Rep., 8 Q. B., 368.

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would continue the liability of the lands held by any other, and many cases can be conceived which would be attended with a similar result.

Now, in the present case, the circumstances attending the sale by the Lord Craven of 1812 of the manor and lands in Sutton Courtney to the plaintiff's predecessors in title are not brought before us in evidence. All that we have is the instrument of conveyance by which the manor and the residue of the allotments were conveyed, and we have neither the prior agreement between the parties nor any evidence of what the bargain between them in fact was.

That there was a prior agreement and bargain is obviously to be inferred from the facts which are in evidence.

The agent of the present Lord Craven in his letter, which is made part of the case, says that the sale was in 1807, and we know that the conveyance was not until 1812, and that there were prior sales and conveyances to Elderfield of other lands of the then Earl of Craven which were probably subject to this rent.

Now it can hardly be supposed that Lord Craven and his agents were ignorant of the existence of the rent as a charge upon these lands, and it is quite impossible to presume that he or they were guilty of the fraudulent act of concealing from the purchaser the existence of such a charge and selling the lands as free from it.

492] *It is reasonable, therefore, to infer that the purchaser (either from the abstract of title or otherwise) was aware of it, and if he was aware of it and has himself never paid it knowing that the land was liable to distress in the event of its non-payment, what other reasonable inference can be drawn but that that, which is very usual in such cases, took place, viz., that the manor was sold free from the rent in question, and at a higher price, therefore, to Lord Craven for it than he otherwise would have got, he on his part undertaking to pay the rent in future, and indemnifying the purchaser and his successors in title against it? Again, it is not to be supposed that the Lord Craven of 1812 would have been so foolish as to continue to pay so considerable a sum as £80 a year, unless he had entered into some bargain with the owner of the land to which it was subject to do so.

In support of so long a receipt as that of sixty years by the defendant it is surely fair and just to resort to a presumption that the payment rested upon some legal foundation, rather than to suppose that it has been gratuitous or by a mistake which, although alleged, is not in any way

supported by evidence, and does not appear very probable. For these reasons, therefore, we think that the fair presumption arising from the facts proved is, that the continued payment has been made by Lord Craven and his successors under some arrangement made at the time of the purchase by Elderfield, and to which he was a party, and by which his successors in title are bound, and, therefore, that the defendant's remedy is not barred by the operation of the statute, and we give our judgment for him.

Judgment for the defendant.

Solicitor for plaintiff: *T. Graham.*

Solicitors for defendant: *Peacock & Goddard*, for Maule & Barton.

[2 Queen's Bench Division, 498.]

Feb. 12, 1877.

[IN THE COURT OF APPEAL.]

*SUGG V. SILBER.

[493]

Patent—Notice of Objection—Two Inventions—15 & 16 Vict. c. 88, s. 41.

Under notice of objection by a defendant, to an action for infringing a patent, that the invention was not new, the defendant can at the trial show that one of two inventions described in the specification is not new, and that the patent is therefore bad.

ACTION for damages and to restrain the infringement of a patent, commenced in October, 1874.

The defendant pleaded eleven pleas, amongst which was, that the plaintiff was not the true inventor of the supposed invention, and that it was not a new manufacture. The defendant's notice and particulars of objections contained the following:—

“That the plaintiff did not invent the supposed invention in the declaration firstly mentioned, and was not the first and true inventor thereof, nor was the same supposed invention any manner of new manufacture, nor was it new at the date of the said letters patent.

“That the same supposed invention was not an invention of improvements in gas-burners, and in the method of constructing and manufacturing the same, and was not such an invention as was or could be the subject-matter of valid letters patent, nor was it the working or making of any manner of manufacture for which letters patent can by law be granted.

“That the plaintiff after the date of the said letters patent caused an instrument in writing, purporting to be a

specification to be filed in the Great Seal Patent Office, but did not thereby or by any other instrument in writing, and under his hand and seal, filed in the Great Seal Patent Office within the prescribed period, particularly describe and ascertain the nature of the said supposed invention, and in what manner the same was to be performed, and did not by the same specification, or by any other such instrument in writing, as aforesaid, sufficiently ascertain, distinguish, and point out which of the parts and things therein described or mentioned he claimed to have invented, or as being new, or as being comprised in the said letters patent, and which of such parts and things he did not so claim, or were not so comprised, and further parts and things he did not so claim, or were not so comprised, and further that the same specification is vague and ambiguous in its terms, and calculated to mislead."

The patent was for "Improvements in gas-burners, and in the method of constructing and manufacturing the same;" and the specification, after describing the improvements, proceeded to describe the improvements in manufacturing [494] the same, which *consisted chiefly in casting and fixing the principal parts in one operation as therein described.

At the trial before Blackburn, J., one of the points raised for the defendant was, that the specification was bad because it claimed as a separate matter the casting and fixing, which were not new. For the plaintiff it was said that this point was not open to the defendant on his notice of objection, and this point was reserved. On the questions left to the jury whether the specification sufficiently described the invention, and whether there had been an infringement, the jury found for the plaintiff.

The defendant obtained a rule to show cause why judgment should not be entered for the defendant on the ground of insufficiency of the specification; or why a new trial should not be had, on the ground of misdirection as to the construction of the specification.

The Queen's Bench Division (Blackburn, Mellor, and Field, JJ.) held that the specification was bad. One of the claims was for casting and fixing in a manner which it was admitted was not new, and this, therefore, on the authorities, made the whole patent void. The court further held that there was a distinct denial by the defendant that the specification was good. It was, therefore, open to the defendant to raise this objection, and the defendant was entitled to judgment on the point reserved.

The plaintiff appealed.

Cave, Q.C., and *Webster*, for the plaintiff: The objections must be definite, *Fisher v. Dewick* ⁽¹⁾, which was under 5 & 6 Wm. 4, c. 83, s. 5, but the terms of that act are nearly the same as those of the present act: 15 & 16 Vict. c. 83, s. 41. The plaintiff has a right to have the objection brought to his notice so that he may know how to meet it: *Heath v. Unwin* ⁽²⁾. [They then proceeded to argue that the specification was good, and that the part which was old was merely a repetition of what had been claimed in the former part, and also argued that the method of casting and fixing was new.]

Aston, Q.C., *Macrory*, and *W. G. Harrison*, for the defendant.

MELLISH, L.J., said that the point as to the method of casting and fixing being new had not been raised [495 before, and was hardly seriously raised now. If there was anything in it, there might be a new trial, but the court ought not to direct an issue simply for the purpose of trying something which necessarily, as far as the court could see, must be found in favor of the defendant. The Lord Justice then proceeded:

Therefore the case must turn upon the point reserved as to the notice of objections. The authorities cited by Mr. Cave were cases where objections had been taken to the notices of objection at the time when they were delivered, and further and better particulars were asked for. In my opinion there is a very large difference between a case where a judge has been applied to and has ordered further particulars in order to state an objection more specifically, and a case where at the trial the plaintiff asserts that the defendant ought to be prevented from availing himself of an objection. It is perfectly obvious that if Mr. Cave was right in saying that the two questions are the same, and that wherever the court would order further particulars because the objection had not been particularly specified, it would also hold that the party was precluded from raising it at the trial, nobody would be foolish enough to apply to a judge for further particulars. Although the objections did not specifically point out that the invention consisted of several claims, yet the objection, that the invention is not the subject-matter of a patent, is sufficient to open the objection that the whole, or some particular part of it, is not the subject-matter of a patent, and that consequently the patent is bad. Therefore I am of opinion that the notice of objections was sufficient.

⁽¹⁾ 4 Bing. N. C., 706.
21 ENG. REP.

⁽²⁾ 10 M. & W., 684.

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[The Lord Justice then expressed his conclusion that the method of casting and fixing was part of what was claimed by the specification, and, that being not new, the specification was bad.]

BAGGALLAY, L.J., and BRETT, J.A., concurred.

Judgment affirmed.

Solicitors for plaintiff: *C. Rogers & Son.*

Solicitors for defendant: *Johnson, Upton & Co.*

[2 Queen's Bench Division, 501.]

June 25, 1877.

501]

*LOHRE V. AITCHISON.

Marine Insurance—Partial Loss—Cost of Repairs—Allowance of one third New for Old—Suing and Laboring Clause—Salvage Expenses.

The defendant insured the plaintiff for £1,200 upon a ship valued at £2,600. The ship encountering rough weather suffered sea damage, and incurred salvage expenses to the amount of £519. She was repaired, and the result of the repairs, the ship being an old one, was to make her more valuable when repaired than she was at the time of the insurance. The defendant, in an action on the policy to recover for a partial loss, contended that he could not be liable for more than a total loss with benefit of salvage, deducting from such salvage the ship's proportion of salvage and general average expenses, and that the depreciation in value of the ship by sea damage, not the cost of the repairs, was the measure of the partial loss:

Held, that the cost of repair, making the usual deduction of one third new for old, was the measure of the loss if the shipowner elected to repair, and consequently that the assured was entitled to recover such cost of repair up to the amount insured for, even although the loss so estimated might amount to more than a total loss with benefit of salvage:

But *held*, that the assured could not recover under the suing and laboring clause in respect of a proportion of the salvage expenses over and above the £1,200, because, the damage done to the ship being so great as already to exhaust the policy and the assured not having abandoned, the salvage expenses did not enure to the benefit of the underwriter.

ACTION upon a policy of marine insurance upon the ship *Crimea*.

The declaration contained a count on the policy alleging a total loss of the ship by the perils insured against, and further that the plaintiff necessarily incurred certain charges and expenses under the suing and laboring clauses, and common money counts.

Plea, payment into court of £1,080, being the defendant's proportion of a total sum of £2,340.

Replication denying that such payment into court was sufficient.

By consent of the parties, a special case was stated, of which the facts, so far as material, were as follows:

The policy was for £1,200 upon the ship valued at £2,600,

against the usual sea risks, on an out and home voyage from the Clyde to Quebec or St. John's, and thence to the United Kingdom; and it contained the usual suing and laboring clause. The balance of £2,600, the agreed value of the ship, was covered by other policies.

*The ship on her homeward voyage encountered [502 very heavy weather, and was ultimately while in great danger of being lost, brought into Queenstown by the steamship Texas.

The owners of the Texas demanded remuneration for her services, and arrested the ship and cargo in a salvage suit in the Irish Admiralty Court, which court ultimately awarded £800 for the services of the Texas, against ship and cargo owners.

The ship was surveyed and examined at Queenstown by competent surveyors, who reported as to the necessary repairs. The plaintiff thereupon applied for estimates of the expense of doing such repairs, and the lowest estimate obtained was from the Cork Harbor Docks and Warehouse Company, whose estimate was £2,982, exclusive of sails, rigging or equipments, and certain other costs mentioned in the survey.

The plaintiff accepted the estimate, and a formal contract for the work specified therein at the sum of £2,982 was signed between the plaintiff and the said company. The plaintiff at the same time obtained estimates for the necessary rigging, &c., amounting to £988 14s. 5d. The ship was accordingly repaired under the said contract. Besides the work included in the contract for £2,982, the rigging, sails, and equipment were made good as specified in the survey, and other work therein described was done to her. She was at the same time metalled (not having been metalled before the loss), and in addition, certain other work was done to her, included neither in the survey nor in the contract for £2,982, the cost of which amounted to about £65. With the exception of this £65 and the metalling above mentioned, all the work done to the ship was specified in the survey or included in the contract for £2,982. Of the work above described, it was admitted that the metalling, the cost of which was about £895 17s. 10d., and certain other matters the cost of which amounted to about £500, was new work and not properly repairs, and no claim was made in respect of them.

All the works with the exception of the last mentioned sums, were undertaken for the purpose of making the ship staunch and strong and seaworthy, which she had ceased

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to be by reason of the sea damage she had sustained, and they were reasonably necessary for the purpose. The effect 503] of the works was to make the ship a *very much stronger and better ship and of very much greater value than she had been before she sustained damage. Divers general average charges were incurred, to which the ship was liable to contribute and which were covered by the policy, and divers particular average charges were incurred other than those for repairs which were covered by the policy.

The ship, at the time of the loss, was fifteen or sixteen years old. Her value in her undamaged condition, before the loss, was £3,000. Her value, as she lay in her damaged condition, was £998. The amount of the salvage and general average expenses borne by the ship was £519 0s. 1d. The amount expended on the ship (exclusive of the £695 17s. 10d. for metalling and of the £500 for work admitted to be new work) was £4,414 18s. 11d. The last mentioned amount (after deducting therefrom one third new for old in all matters to which such deduction is properly applicable) added to the amount of the other particular average charges on ship, amounted to £3,178 11s. 7d. The value of the ship after repairs was £7,000.

The plaintiff contended that upon the facts above stated he was entitled to recover £1,707, a sum arrived at in the following manner: the said sum of £515 0s. 1d., being the ship's proportion of salvage and general average charges, and the said sum of £3,178 11s. 7d., added together, made the aggregate sum of £3,697 11s. 8d.; and £1,707 bears the same proportion to £3,697 11s. 8d., which £1,200, the amount insured, does to £2,600, the valuation in the policy. If this contention was right, the amount paid into court was deficient.

The defendant contended that the above repairs could not be allowed in particular average or as a measure of the depreciation of the vessel, and that in any event the underwriters were not liable for more than a total loss with benefit of salvage, deducting from such salvage the ship's proportion of all salvage and general average charges.

The court were to draw inferences of fact.

The question for the court was whether the plaintiff's contention or the defendant's was correct, or upon what principle the defendant's liability was to be estimated; and it was agreed that after the decision of the court the matter 504] should be submitted to *an arbitrator, to settle the figures upon the footing laid down by the court.

Cohen, Q.C. (*Hollams* with him), for the plaintiff; The

contract of insurance is a contract of indemnity. The assured is not bound to abandon but is entitled to repair the ship, and if he does repair, the expense of repairing is the measure of the loss, subject to the customary deduction of one third new for old; consequently the expense of such repairs may be recovered up to the amount insured. It must be admitted that the claim of the plaintiff for £1,707 is excessive, but it is not disputed by the defendant that the plaintiff is entitled to recover in respect of the salvage expenses amounting to £519 0s. 1d., and it is contended that he is entitled to recover in respect of an average loss up to the amount insured, which average loss is to be calculated as before stated, viz., by the amount expended in repairs, subject to the deduction of one third new for old. The plaintiff will therefore be entitled to recover such a proportion of £3,119, that is the amount of the salvage expenses, £519, added to £2,600, the total value insured on, as twelve bears to twenty-six. The amount paid into court is therefore insufficient, the plaintiff being entitled to recover £1,400 odd. It is a fallacy to suppose that the plaintiff cannot recover in respect of a partial loss more than the amount of a total loss with benefit of salvage. The case of a ship differs from that of cargo insured. It has never been suggested before that, for the purpose of estimating a partial loss on ship, you should take the value of the ship and take the proportion by which the value of the ship as depreciated after the loss is less than such estimated value. The ship is not to be treated merely as a salable chattel as goods are. It is erroneous to suppose that the contract is only to put the assured in the same position pecuniarily as before the loss. The owner of the ship does not want the ship as a speculation for the purposes of sale, but as a freight earning machine. The fact that the owner will be better off than if there had been a total loss is an accident, arising from the operation of the well established rule that deducts one third new for old. When the ship is old, this rule operates in favor of the assured, but when it is new it operates in favor of the underwriter. The rule is an arbitrary one, but it is perfectly *well established as [505 working well on the average, and the fact that in this particular case it gives the plaintiff an advantage cannot alter the general principle by which the amount of the repairs is the measure of the loss. [He cited *Kidston v. Empire Insurance Company* ('); *Stewart v. Steele* (*).]

Benjamin, Q.C. (*Crofton* which him), for the defendant :

(1) *Law Rep.*, 1 C. P., 585; 2 C. P., 357.

(*) 5 *Scott*, N. R., 927.

It is an error of principle to say that the cost of repair is the measure of the loss. It is generally the measure, because in most cases the amount of the cost of repair and the amount of loss differ very little. The depreciation in value of the ship is the measure of the loss. The net value of the ship, after deducting the salvage expenses, was £998. That deducted from £2,600 the agreed value, leaves £2,121. The plaintiff here gets for salvage what is worth £479, that being the net value of the hull: this added to £2,340, 90 per cent. of £2,600 of which sum the sum paid into court is the defendant's proportion, amounts to £2,819 on a partial loss, when a total loss would have been £2,600, and yet the plaintiff says that he has not recovered enough. It is contended that it is impossible that the underwriters on a single peril can have to pay more in respect of a partial loss than in respect of a total loss, and that consequently the plaintiff is far overpaid already.

The fallacy in the plaintiff's mode of calculation is that he takes the vessel at her value after she has been made a new vessel; in other words, he wants to build a new vessel at the underwriters' expense. The shipowner is no doubt not bound to abandon, but if he does not he cannot throw a greater loss on the underwriters than a total loss would be. [He cited *Lidgett v. Secretan* (1); *Knight v. Faith* (2); 2 Phillips on Insurance, paragraph 1743; *North of England, &c., Insurance Co. v. Armstrong* (3).]

Cohen, Q.C., in reply, cited *Peele v. Merchants' Insurance Co.* (4).

Cur. adv. vult.

June 25. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J.: This case raises the following questions for our 506] *decision: First, whether the liability of the underwriters on a ship which has been repaired by the assured is to be measured by the cost of the repairs or by the depreciation of the vessel as a salable chattel. Secondly, whether, in the case of a partial loss, the assurer can be liable for more than a total loss with benefit of salvage.

The facts may be briefly stated. The defendant insured for £1,200 upon a ship valued in the policy at £2,600. The works necessary to repair the sea damage cost, after the usual allowance of one third new for old, together with certain particular average charges covered by the policy,

(1) Law Rep., 6 C. P., 616, 626.

(2) Law Rep., 5 Q. B., 244.

(3) 15 Q. B., 649; 19 L. J. (Q.B.), 509.

(4) 3 Mason, 27.

the sum of £3,178 11s. 7d. In addition to this expenditure the plaintiff had to pay £519 for salvage services and general average expenses. The value of the ship at the commencement of the risk was £3,000 and her value on her return to port in her damaged state £998. Being an old ship, the effect of the extensive repairs done was to make her a very much stronger and better ship than she was before the damage, and after having been metalled (which she was not before) at a cost of £695 17s. 10d., and had new works done at a cost of about £500 (neither of which sums is, of course, charged against the underwriter), she was worth £7,000.

If the loss is to be estimated by the depreciation of the ship as a salable chattel, the defendant has paid more than sufficient into court. For, deducting from the value of the hull, the cost of bringing her to port, and supposing that to be £519, the balance £479, represents the salvage; and deducting that sum from the £3,000, her value when she sailed, the depreciation by sea damage would be £2,521, or about 84 per cent., which, upon £1,200, would be £1,008. This is the principle on which damage to cargo is estimated, and this the defendant contends is all that he is liable to pay. And what lends additional force to the defendant's contention is, that even with this percentage the plaintiff will be more than indemnified. He has paid altogether, in order to get the ship up to her present value of £7,000, sums for repairs amounting to £4,414 18s. 11d.; for metalling £695 17s. 10d.; for other new work £500, and for salvage and average charges £519; making together £6,129. If he receives 84 per cent. on £2,600 he will realize £2,184, which, deducted from £6,129, leaves £3,945 as the *total outlay to be borne by him; adding to [507 this the original value of the ship, £3,000, the aggregate falls short of what the ship is now worth by £55. And if he recovers from the underwriters the full amount of the insurance, he will be nearly, if not more, than £500 in pocket. This is certainly a startling result, and one which gives great moral force to the defendant's argument. But notwithstanding it happens in this particular case that the plaintiff will be not merely indemnified, but will be a considerable gainer, the contract cannot receive a different construction from that which it would have received if the result had been loss instead of gain to him. For the indemnity intended by the contract of insurance is the making good to the assured the loss he sustains by sea damage during the voyage insured. Whether the assured will ultimately be a gainer or a loser by the transaction is a

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matter beyond the scope of the contract, and one with which the underwriter has no concern. The circumstance, that in this case the owner happens to be in the result in a better position than he would have been if the accident had not happened, cannot therefore be taken into account. We must consequently return to the only question we have to consider, viz., what is the measure of damage which the underwriter on a ship engages to pay in the case of a partial loss. Is the ship to be viewed for the purpose of this computation in its damaged or in its repaired condition? If ships were kept merely for sale, it might reasonably be contended that the same principle should be applied which is applied to damaged goods. But a ship is intended to be used for profit. The owner is in many contingencies bound to repair. He has always the right to repair, and it is in the contemplation of both parties that if damage happens the ship will be repaired if it is worth the cost. If, instead of repairing, the owner chooses to sell the ship in her damaged condition, he fixes his loss at the difference between what she was worth at the commencement of the risk and what she sold for. But if he elects to repair, the loss is ascertained by the cost of the repairs, less a proper deduction on account of having new timber for old. Nothing short of this would be an indemnity. The cases cited by Mr. Benjamin are no authority for the position that when the [508] repairs have been done, *their cost, with the qualification just mentioned, is not the proper measure of damage.

The anomaly in this case is really caused by the arbitrary rule which has been established of estimating the benefit which the owner receives from having new timbers in the place of old at one third of their cost. If it were allowable to enter into the inquiry what in the present case should be the proportion, a much larger allowance—perhaps two thirds—would be a nearer approximation to the reality, and that would have reduced the claim on the underwriter to the dimensions of an ordinary partial loss. But this, we think, cannot be done. To prevent the disputes and difficulties which such an inquiry in each particular case would cause, an average rate of allowance has been adopted, and the usage has been so long established and so uniformly applied, that it has become impliedly incorporated into the contract: see *Da Costa v. Newnham* (1); *Poingdestre v. Royal Exchange Assurance Company* (2); *Fenwick v. Robinson* (3). For repairs to ships which in the language of

(1) 2 T. R., 407.

(2) R. & M., 378.

(3) 3 C. & P., 323, at p. 324.

marine assurance are termed "new" ships, that is, ships on their first voyage, or which are less than a year old (for it does not seem to be settled what the precise test of novelty is), no allowance is made, for they cannot be the better for the repairs. But as to all other ships the rule applies, whatever may be their age or the state of their timbers. If the ship is like the *Crimea*, an old ship, the rule operates greatly in favor of the owner; if the ship is a sound, newly built ship, the underwriter has a great advantage. It is clearly for the benefit of all parties that some fixed rule of allowance should be established, and as this has prevailed so long it may be presumed that on the whole, and in the long run, justice is done. At all events, being so established and being by implication part of the contract, it cannot be varied to meet the equities of a particular case. The contention that underwriters are not liable for more than a total loss with benefit of salvage, is founded on a misconception of the contract, which is, as before observed, a contract of indemnity. When the assured abandons and claims for a total loss, the underwriter is *entitled to salvage. [509] But the owner is not bound to abandon. This Mr. Benjamin admitted. He may always repair if he pleases, and claim for a partial loss, and when he does so the salvage belongs to him. The contract is not to pay £1,200 in the event of a total loss only, and a smaller sum if the loss is only a partial one. If this had been the intention it should have been so expressed. What the underwriter engages to pay is any loss which the assured may incur from the perils assured against, not exceeding the specified amount.

The claim for a proportion of the salvage expenses over and above the £1,200 is one which we think ought not to be allowed. It is true the policy contains the usual suing and laboring clause, which is a separate contract, and by which the underwriter engages to contribute towards the expenses of "labor and travel for, in, or about the defence, safeguard, and recovery of the said ship." But the salvage services were not employed with any view to the benefit of the underwriter, nor did they enure to his benefit. The damage done was so great as already to exhaust the policy, and the underwriter could gain nothing from the effort used to save the ship from sinking unless the plaintiff abandoned. If he had abandoned, the defendant would have had the benefit of the services in having the hull, which was preserved by them, and then he must have paid for them. But as the assured refused to abandon, he elected to appropriate those

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services to his own benefit, and having done so, he cannot charge them against the underwriter.

Judgment accordingly.

Solicitors for plaintiff: *Hollams & Coward.*

Solicitors for defendant: *Waltons, Bubb & Walton.*

[2 Queen's Bench Division, 510.]

June 9, 1877.

[CROWN CASES RESERVED.]

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*THE QUEEN V. COOPER.

False Pretences—Evidence of Pretences.

C. was convicted of obtaining potatoes from the prosecutor by falsely pretending that he then was in a large way of business, that he was in a position to do a good trade in potatoes, and that he was able to pay for large quantities of potatoes as and when the same might be delivered to him. The evidence that C. had so pretended was the following letter written by him to the prosecutor: "Sir,—Please send me one truck of regents and one truck of rocks as samples, at your prices named in your letter; let them be good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours, &c.

"P. S. I may say if you use me well I shall be a good customer. An answer will oblige saying when they are put on."

Held, affirming the conviction, that the words of the letter were fairly and reasonably capable of a construction supporting the pretences charged, and that it was a question for the jury, whether the writer intended the prosecutor to put that construction upon them.

CASE stated by the chairman of the quarter sessions for the West Riding of Yorkshire, holden at Wakefield.

William Cooper was, on the 2d day of April, 1877, convicted of having obtained 8 tons 15 cwt. 2 qrs. of potatoes, the property of one John Gellatly, by false pretences.

The indictment charged that William Cooper did falsely pretend to one John Gellatly that he the said William Cooper then was a dealer in potatoes, and as such dealer in potatoes then was in a large way of business, and that he then was in a position to do a good trade in potatoes, and that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him, by means of which said false pretences the said William Cooper did then unlawfully obtain from the said John Gellatly eight tons fifteen hundred weights and two quarters of potatoes of the goods and chattels of the said John Gellatly with intent thereby then to defraud. The indictment then negatived the pretences.

In support of the prosecution the following letter, addressed to John Gellatly, was given in evidence:—

"Sheffield, Jan. 17th, 1876.

"Dear Sir,—Please send me one truck of regents and one *truck of rocks as samples, at your prices named in [51] your letter; let them be good quality, then I am sure a good trade will be done for both of us. I will remit you the cash on arrival of goods and invoice.

"Yours truly, William Cooper.

"P. S.—I may say if you use me well I shall be a good customer. An answer will oblige saying when they are put on."

It was amply proved in evidence that the prisoner when he ordered the regents and rocks, which are kinds of potatoes, had no intention of paying for them; that he held from time to time a stall in the public market for which he paid by the day, and also dealt as a huckster, carrying about fruit in a small cart drawn by a donkey; and several of the witnesses, though very well acquainted with him and his trade, were ignorant of his dealing in potatoes.

The potatoes were sold by the prisoner in part at the railway station, at a less cost than they would have stood to him, and as to the other part, when on receipt of a telegram from the seller inquiries were made by the railway people, the prisoner, who was at the station filling his sacks, left the potatoes and his sacks, and could not be heard of for several weeks though the police were in active search of him.

It was contended by the prosecution that the letter or order of the prisoner amounted to a representation that he was a person trading in a considerable way, and that the order given was on a scale consistent with his ordinary transactions; whereas his ordinary dealings were on a very small scale, to which the large order for potatoes was disproportionate, and that consequently the prisoner had misrepresented his real character and position, and thereby had made the false pretence alleged in the indictment.

The falsehood of the pretence, supposing this construction to be correct, being amply proved by the evidence, I left the case to the jury, holding that the contention of the prosecution was consistent with law, but leaving it to them, that if they thought the letter did not prove the false pretence as alleged in the indictment the prisoner should be acquitted.

The jury convicted, and the prisoner was admitted to bail to appear to receive sentence at the next quarter sessions.

The question was whether upon the facts proved the defendant was properly convicted upon this indictment.

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512] **S. Tennant*, for the prisoner: The letter is perfectly consistent with the position of the writer being that of a man who has just began, or who is just about to begin to trade largely in potatoes. The expression as "samples" in the letter is consistent with this view. The letter does not contain any statement as to the writer's past position, or as to his then position, but merely statements of what the writer intends or hopes to do in the future. Even if the letter is capable of the interpretation sought on the part of the prosecution to be placed upon it, yet it is at least as capable of an innocent interpretation. It contains no express statement of existing facts, and it does not, by necessary implication, contain any such statement.

[LUSH, J.: I do not think the inference need be a "necessary" inference, it must be a natural and reasonable inference.]

A promise to pay has never been held to imply a statement of present ability to pay, and the letter contains no statement of ability to pay, unless it is to be inferred from the words "I will remit you cash on arrival of goods and invoice." Both upon principle and upon authority no such inference ought to be drawn from the words. Where two constructions are possible, the court will, notwithstanding the verdict, put upon the words and conduct of the prisoner the innocent in preference to the guilty construction: *Reg. v. Burrows* (¹). In *Reg. v. Giles* (²) the conduct of the prisoner was equivalent to a pretence that she was possessed of supernatural power. No other explanation of her conduct was possible. In *Reg. v. Hazelton* (³) the act or conduct which deceived was accompanied by words; the prisoner not only drew a check which he knew would not be honored, but said, when he gave it for the goods, that he wished to pay ready money. So in *Rex v. Barnard* (⁴), the prisoner not only wore the cap and gown of an undergraduate, but said that he was of Magdalen College. The words or conduct should necessarily imply the pretences charged in order to justify a conviction: *Reg. v. Hazelton* (⁵).

Lockwood, for the prosecutor: It was not a necessary 513] implication *in *Reg. v. Hazelton* (⁶) that the prisoner had funds to meet the check, but it was a natural implication, and that is enough. The question is, what would a reasonable man gather from this letter? As in cases of libel, if the words can bear the alleged meaning, the question is one for the jury.

(¹) 11 Cox, 258.

(²) L. & C., 502; 34 L. J. (M.C.), 50.

(³) Law Rep., 2 C. C. R., 134.

(⁴) 7 C. & P., 784.

[DENMAN, J.: What fact do you say is misstated in this letter?]

The whole letter appears to be that of a large dealer, and was written to make the recipient believe the writer to be a large dealer. The quantity desired as "samples" is so large that only a very large dealer could require it. In *Reg. v. Giles* (') Blackburn, J., says: "It is not requisite that the false pretence should be made in express words, if the idea is conveyed." The letter taken as a whole conveys the idea of the writer being of good position, in large trade, and able to pay.

Tennant in reply.

LORD COLERIDGE, C.J.: The prisoner has been convicted of obtaining goods by false pretences, and the question which we have to consider is whether there was evidence upon which the jury were justified in convicting. The letter, which is set out in the case, constituted the sole evidence of the making of the false pretences charged in the indictment. [His Lordship read the letter.] The true principle to be applied to cases of this kind is that laid down by Lord Blackburn in the case of *Reg. v. Giles* ('), where he says that it is necessary to consider what is the idea intended to be conveyed. The question is, what was intended to be conveyed by the particular words used or by the particular conduct? If the words can reasonably convey that which is charged as the false pretence in the indictment, and if they were meant by the prisoner to convey that which is so charged, and if, in fact, they did convey that which is charged, the offence is as complete as though the false pretence had been made in express words. This letter which I have read was meant to tell the prosecutor that which the indictment charges the prisoner with having falsely pretended, or at any rate it is reasonably consistent with the *alleged false pretence, and the goods were obtained [514 by reason of the prosecutor having attached such reasonable meaning to it, and the jury have convicted the prisoner. The conviction must stand.

MELLOR, J., concurred.

LUSH, J.: The question for our consideration is, was there evidence on which the jury could reasonably convict the prisoner of the offence charged? The pretences charged are that "he then was a dealer in potatoes, and as such dealer in potatoes then was in a large way of business;" that he "then was in a position to do a good trade in potatoes;" and that he "then was able to pay for large quanti-

(') L. & C., 502; 34 L. J. (M.C.), 50, at p. 53.

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ties of potatoes as and when the same might be delivered to him." The pretence, in order to justify a conviction, must be of existing facts. It may be made either by words, or by acts. It is sufficient if it can be reasonably and naturally inferred from the words or from the acts, in order to raise a question for the decision of the jury. It is not necessary that the words or that the acts should be capable, only, of the meaning charged by the indictment. If the words in the letter written by the prisoner in the present case were intended to mean, and are fairly capable of meaning, that which is charged, and if they were so understood, then there was as much a pretence as though the letter had contained a definition of their meaning. The words here are capable of supporting the pretences charged. Without further explanation this large quantity is asked for as a sample, and then the prisoner says he will remit, and talks of the trade to be done. The letter is fairly capable of representing and conveying to the mind of the reader that the defendant was a man dealing largely, and in a position to do a good trade, and remit at once on delivery. The jury have adopted this construction, and have found that the prosecutor did so read the letter, and that the prisoner intended it to be so read. I therefore think the conviction right.

DENMAN, J.: I have entertained and still do entertain some doubt in this case, viz., whether the letter does contain any representation of an existing fact. If it does not, 515] the conviction *cannot stand. There is, however, one statement which when construed by the light of, and with the assistance of, the case of *Reg. v. Giles* (') may fairly, I think, be considered as a statement of fact. I assent, therefore, to the judgment of the court upon this ground, that the words "I am sure a good trade will be done" amount to a statement as to the writer's position or at any rate raise a question for the jury as to whether they do not amount to such a statement. The words "I will remit," &c., import no present ability; they amount only to a promise, but the statement that he is sure that a good trade will be done, when at the time he knows, and is sure, that it will not, is a misstatement, I think, of fact, a misstatement as to his position. It is enough, in order to sustain the conviction, that one false pretence by which the prosecutor was induced to part with his goods should be proved, therefore I agree that the conviction should be affirmed.

POLLOCK, B.: At first I felt considerable doubt about this case, but I come to the conclusion that the conviction

(') L. & C, 502; 34 L. J. (M.C.), 50.

should be affirmed. I agree that the words must be fairly and reasonably capable of bearing the meaning charged, and in this case I think they are. I take this letter as a whole, and as a whole it is the letter of a man who desires to convey that he is what he is not, viz., a substantial dealer, able to take this large quantity as a sample. The jury were warranted, I think, in the conclusion at which they arrived.

Conviction affirmed.

Solicitor for prosecution: *E. K. Binns*, Sheffield.

Solicitor for prisoner: *Fairburn*, Sheffield.

[2 Queen's Bench Division, 516.]

April 19, 1877.

***THE QUEEN V. THE JUSTICES OF MIDDLESEX. [516]**

Mandamus—Justices' Review of decision of—Conviction quashed on Point of Form—Preliminary Objection—5 Geo. 4, c. 83, s. 4.

The appellant was convicted by a metropolitan police magistrate under 5 Geo. 4, c. 83, s. 4, which makes punishable as a rogue and vagabond "every person . . . using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects." The conviction described the offence as "unlawfully using certain subtle craft, means, and device" (omitting the words "by palmistry or otherwise"). Upon appeal to the Middlesex Sessions, the proceedings commenced with an objection from the appellant that the omission of the above words made the conviction bad. The justices, after hearing the point argued, retired, and on their return the assistant judge gave what purported to be the decision of the sessions, quashing the conviction on the objection taken to it. Upon application for a mandamus to the sessions to hear the appeal on the merits, it was proposed to show by affidavits from the justices that the decision given by the assistant judge was contrary to the opinion of a majority of the justices forming the court, and that after such opinion had been communicated to him, he persisted in giving his decision as that of the sessions:

Held, first, that the order of sessions having been duly recorded, it was too late to inquire whether it did or did not represent the opinion of the majority of the justices. Secondly, that the decision upon the form of the conviction was not a decision upon a preliminary matter, but a hearing and adjudication upon the merits, which upon a mandamus could not be reviewed.

UPON application for a mandamus to the justices of Middlesex, the facts as disclosed by the affidavits were that in October, 1876, an information preferred against one Henry Slade before a metropolitan police magistrate, under the Vagrant Act, 5 Geo. 4, c. 83, s. 4 ('), was heard, and he

(') 5 Geo. 4, c. 83, s. 4: "Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects . . . shall be deemed a rogue and vagabond within the true intent and meaning of this act, and it shall

be lawful for any justice of the peace to commit such offender" (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witnesses) "to the house of correction, there to be kept to hard labor for any time not exceeding three calendar months. . . ."

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was convicted and committed to hard labor for three months. The conviction stated that Slade was convicted of being a rogue and vagabond within the intent and meaning of 5 Geo. 4, c. 83, "An act for the punishment of idle and disorderly persons, and rogues and vagabonds"—"For 517] that the *said H. Slade, on September 15, 1876, at No. 8 Upper Bedford Place, Middlesex, &c., did unlawfully use certain subtle craft, means, and device, which subtle craft, means, and device were that the said Henry Slade did then and there write on a certain slate then and there produced by the said Henry Slade certain words purporting to be, and which he intended to represent to E. R. Lankester and H. B. Donkin as being, words written on the said slate by the spirit of a certain person then deceased." Upon appeal to the Middlesex Sessions, the conviction was read, and the counsel for the defendant at once stated that he objected to it on the ground that it did not follow the statute, inasmuch as the words "by palmistry or otherwise" were not inserted after the words "subtle craft, means, and device." The assistant judge asked the counsel for the prosecution whether he wished to amend the conviction by adding the words in question. In reply it was said that the words were advisedly omitted, and that no amendment was asked for. The objection to the form of the conviction was then argued, and after the argument the counsel for the prosecution proposed to reconsider his decision and to ask for an amendment. The assistant judge said that it was too late to allow the amendment, and having retired with the other justices, returned to court and read a judgment to the effect that by the omission of the words the conviction was bad on the face of it, and must be quashed. A case was asked for, but refused on the ground that there was a sufficient remedy by mandamus.

Feb. 15. *A. S. Hill*, Q.C., moved for a mandamus to the sessions to hear the appeal, on the ground that they had refused to hear it on the merits. He also moved on the ground that the appeal had not been determined by the sessions, and referred to affidavits by several of the justices to the effect that, after the court had retired to consider the case, a large majority of the justices came to the conclusion that leave to amend the conviction ought to be given, but the assistant judge disregarded their decision, and persisted in delivering his own judgment as that of the court, though requested by some of the justices to state that it was his own decision and not theirs.

THE COURT (Mellor and Lush, JJ.) refused to grant a rule

*upon the last ground, thinking that after the order [518 of sessions had been recorded without objection from the dissentient justices, it was not possible, under a mandamus, to inquire whether the order was the decision of the majority of the quarter sessions or that of a minority only, but on the first ground they granted a rule, calling on the justices to show cause why a mandamus should not issue, commanding them to enter continuances and hear the appeal upon the merits.

April 19. *Massey* showed cause: First, the conviction having been quashed cannot be revived by a mandamus to hear the appeal, for the order of sessions quashing the conviction has not been brought up by certiorari, and will remain in force: *Reg. v. Dayman* (¹); *Reg. v. JJ. Worcester* (²); *Rex v. JJ. Monmouth* (³). [THE COURT intimated that if there were any difficulty in point of form they would amend the proceedings by granting a certiorari to bring up the order of sessions.] Secondly, the justices did not decline to exercise jurisdiction, but actually heard and determined the appeal. The objection upon which the conviction was quashed was one which necessarily arose upon the appeal, and must at some stage of the proceedings have been decided. The sessions gave a decision upon the construction of the section, and it was a mere accident that the decision was given upon the form of the conviction and at the outset of the proceedings. It was not a decision upon a mere preliminary point, but upon a substantial question of law, whether the words "by palmistry or otherwise" were words limiting the class of offence. A mandamus would therefore be inoperative, for the sessions, in obedience to it, would have to decide over again a question which they have already decided: *Reg. v. JJ. Worcester* (⁴). In all the cases where a mandamus to hear and determine has been granted, the appeal has been dismissed or the order quashed upon some preliminary point of practice, such as want of notice, want of parties, insufficiency of grounds of appeal, or something unconnected with the merits of the case either in law or fact, or where there has been *a refusal to hear [519 the case under the mistaken belief that there was no jurisdiction. No case can be found of a mandamus to hear an appeal after a conviction has been quashed, except where the order of sessions was bad on the face of it. *Reg. v. Inh.*

(¹) 7 E. & B., 672, 678; 26 L. J. (M.C.),

(²) 7 D. & R., 334.

128, 132.

(³) 3 E. & B., 478.

(⁴) 3 E. & B., 477; 23 L. J. (M.C.), 118.

bell, C.J. Per Lord Camp-

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of *Charlbury* (¹), where the sessions quashed an order of removal on the ground that the examinations accompanying it were defective, *Reg. v. JJ. Bristol* (²), where the justices refused to convict under a mistake as to the law, *Rex v. Frieston* (³), *The Overseers of Ackworth* (⁴), *Reg. v. Recorder of Liverpool* (⁵), are cases where this court has declined to review the decisions of justices under similar circumstances.

A. S. Hill, Q.C. (*W. Cooper* with him), in support of the rule: The objection upon which the conviction was quashed was substantially a preliminary objection. In *The Overseers of Ackworth* (⁴) and *Reg. v. Charlbury* (¹), which have been relied on by the appellant, the sessions decided that there was something defective in the examinations, which was equivalent to a defect in the evidence before the court. A decision that the omission of certain words from the conviction makes it bad on the face of it, is not a decision on the merits of the appeal. The sessions refused to grant a case upon the understanding that the proper remedy was by mandamus.

MELLOR, J.: I have come to the conclusion that this rule must be discharged. The principle has been very clearly stated in the arguments which have been addressed to us that a mandamus goes where persons having a jurisdiction to exercise decline to exercise it upon some matter preliminary to the hearing of the merits of the appeal, as regards fact or law. Indeed, Patteson, J., in *The Overseers of Ackworth* (⁴), rather objects to the use of the word "merits," and it is no doubt in some sense a misleading word. The question here is, did the sessions decline jurisdiction over this appeal? I am of opinion that they did not. The first point to be considered was this: A conviction was brought before them, and objection was made that the conviction 520] was bad because it omitted *certain words, and did not, therefore, disclose any offence within the statute. That is really the substance of the objection in point of form. Now the magistrates had the power to amend if they were so inclined, and I cannot help thinking that they committed an error or an indiscretion when the council for the prosecution expressed his willingness to argue the point upon the conviction as amended, in not amending, so that the evidence of the alleged offence might be considered, for I suppose they would have considered it if the proceedings had been amended, or else I do not see what the use of the

(¹) 13 L. J. (M.C.), 19; 3 Q. B., 378.

(⁴) 13 L. J. (M.C.), 38.

(²) 3 E. & B., 479, n.

(⁵) 20 L. J. (M.C.), 35.

(³) 5 B. & Ad., 597.

amendment was. But ultimately they declined to amend, and they insisted upon deciding the appeal upon the conviction as it stood in point of form, and they came to a decision, erroneous as I am inclined to think, that the words did not bring the case within the statute, and therefore the defendant was not to be deemed a rogue and vagabond, but was to have his appeal allowed, and the conviction quashed. Things seem to have taken place somewhat out of the ordinary course, and I think it would have been a more discreet exercise of their judgment either to have amended in the first instance when it was suggested, or to have granted a case, when they determined upon deciding upon the form of the order as it stood. However, they declined to adopt either course, and I think they are not amenable to our control, for they have exercised their jurisdiction, and it is a cardinal rule when jurisdiction is vested in magistrates or any body of men, which they may exercise so long as they act within their authority, that however erroneously they decide, we cannot supervise their decision. I am bound by the authority of the cases which have been referred to us. Therefore the rule must be discharged, but I may add that the same difficulty would arise whatever mode of proceeding had been adopted, because the original mistake, if there were one, was in the decision of the sessions, so that it would have made no difference whether we had thought it a case in which a certiorari was the proper remedy. The same point must have arisen, whether the magistrates had done anything which was not within their jurisdiction.

LUSH, J.: I have come to the same conclusion, and I own I come to it with some reluctance, because I am not at all sure *that the judicial mind of the learned judge [521] was applied to the construction of the statute, seeing that he appears to me to make so much of the omission of words which, if they had been inserted, would not, according to my present impression, have made the least difference in the conviction, because it would then still appear that what the defendant was found guilty of were certain acts which were not acts in the nature of palmistry, and the question would still have been whether those were acts which came within the 4th section of the statute, or whether that statute was confined to acts in the nature of palmistry. But the question before us is whether the court has decided the matter of the appeal. After the discussion upon the objection the magistrates retired, and retired, one must suppose, to consider the matter. They returned, and they found the conviction bad on the face of it. That is a decision upon the legal merits of

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the case. If they decided upon the merits of the appeal, the legal merits, or the merits of the matters of fact, we cannot order them to rescind that decision. We are not a Court of Appeal from decisions of the magistrates, and, however erroneously they may have decided, we have no power to interfere. What they have decided is that the conviction, which sets out certain acts done by the defendant, is not good, because according to their view those acts do not bring the case within the 4th section of the statute. Whether that decision is right or wrong, we have here no power to decide or inquire. It is nevertheless a decision. It is no more than saying, It is no use for us to hear the evidence, because if we had heard it all, and we had come to the same conclusion as the police magistrate did, that the defendant was guilty of these acts, we should nevertheless, upon our view of the statute, hold that he was not a rogue and a vagabond within the meaning of the 4th section. Therefore this was not a preliminary objection. The sessions did not refuse to enter into the appeal on the ground of any preliminary matter. They did enter upon it and decide upon the legal merits of it.

Rule discharged.

Solicitor for prosecution: *Solicitor for the Treasury.*

Solicitors for defendant: *Munton & Morris.*

[2 Queen's Bench Division, 524.]

June 1, 1877.

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*ATHERLEY V. HARVEY.

Interrogatories—Libel, Questions as to Publication of—Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, subs. 11—Supreme Court of Judicature Act, 1875, Order XXXI, Rules 1, 5.

Interrogatories asking the defendant whether he has composed or published an alleged libel are objectionable, and will be struck out without requiring the defendant to object to them by way of answer.

MOTION to rescind an order of Lush, J., at chambers, ordering interrogatories delivered by the plaintiff to be struck out.

The second and third paragraphs of the statement of claim charged the defendant with the publication of two libels respecting the plaintiff, which were contained in letters written by the defendant to one Captain Francis. A third libel in the form of some doggerel verses, which were stated to have been published by the defendant respecting the plaintiff, was set out in the fourth paragraph.

The defendant, by his statement of defence, admitted the publication of the two letters, disputing the meaning put upon them, but denied the publication of the third libel mentioned in the fourth paragraph of the claim.

Interrogatories for the examination of the defendant were delivered by the plaintiff, which were as follows:—

1. Were not the words which it is alleged in paragraph 4 of the *statement of claim that you published, or [525 caused to be published, or some or which of them, wholly or in some and what part composed, written, printed, circulated, or sent or given away by you or with your knowledge, authority, sanction, or consent?

2. Was not a copy of the said words referred to in the preceding interrogatory sent or caused to be sent to the plaintiff's wife by you or by some other and what person, with your knowledge, authority, sanction, or consent?

Upon application at chambers, Lush, J., ordered the above interrogatories to be struck out.

The plaintiff moved by way of appeal.

The motion was supported by an affidavit of the plaintiff's wife, stating that she had received by post the verses in question, and believed they were sent by or by the direction of the defendant.

C. Bowen, in support of the application: The order to strike out the interrogatories was made upon the ground that in equity a bill of discovery in aid of an action of libel would be demurrable. The practice is thus stated in *Daniell's Chancery Practice*, 5th ed., vol. 2, p. 1409. "A bill of discovery in aid of an action at law will not be entertained where the whole object of the bill is to obtain discovery of matters which would, if established, subject the defendant to penal consequences, nor, it seems, where the discovery is sought in aid of an action for a mere personal tort," citing *Glynn v. Houston* (""); and again, vol. 1, pp. 481, 482. "Demurrers to discovery may be arranged under the following heads: 1. That the discovery may subject the defendant to pains and penalties, or to some forfeiture, &c. If, therefore, a bill alleges anything which, if confessed by the answer, may subject the defendant to a criminal prosecution—the defendant may object to the discovery." This shows that the practice is peculiar and cannot be extended to common law proceedings, otherwise interrogatories would not be allowed in an action of tort.

[LUSH, J., referred to *Wigram on Discovery*, 2d ed., p. 80, s. 130: "If a question involves a criminal charge, the

(¹) 1 Keen, 329.

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plaintiff is not entitled to an answer to such question, however material it may be to the plaintiff's case:" citing *Thorpe v. Macaulley* (').]

526] *In *Osborn v. London Dock Co.* (') the plaintiff objected to answer interrogatories as to alleged fraudulent practices, on the ground that he would be liable to be indicted. The objection was fully argued, and Parke, B., observes, p. 702: "The 51st section of 17 & 18 Vict. c. 125, says that the party may be interrogated 'upon any matters as to which discovery may be sought.' It does not say that the power is limited to cases in which a bill of discovery will lie." The interrogatories were allowed, leaving the plaintiff to object by way of answer.

[LUSH, J.: May there not be a distinction, in allowing questions to be put, between those which on the face of them have a tendency to criminate, and those which are *prima facie* unobjectionable? With regard to the latter, it may be right to leave the party to make his objection by way of answer.]

In *Scott v. Miller* ('), where the defendant was required to swear that his answer would have the effect of criminating him by rendering him liable to penalties, no such distinction was taken, while in *Bickford v. Darcy* (') the court overruled an objection to answer similar interrogatories, and said that in *Baker v. Lane* (') they were disallowed because there was ground for thinking that they were not put *bona fide*. When no such ground existed they ought to be allowed. It is true that in *Tupling v. Ward* ('), where interrogatories as to the authorship of a libel were disallowed, Martin, B., in giving the judgment of the court, says that they ought not to permit such questions to be asked; but in later cases, *Bartlett v. Lewis* ('), *Atkinson v. Fosbroke* ('), this ruling was not followed. It may well be doubted whether the privilege only exists for the purpose of protecting the defendant from collateral criminal proceedings. At any rate, the person claiming a privilege ought to be required to assert it in his answer. Coming to the later cases, in *Edmunds v. Greenwood* (') and *Villeboisnet v. Tobin* (') the interrogatories 527] were refused because there were no *special circumstances to support them, while in *Inman v. Jenkins* ('),

(1) 5 Madd., 218, at p. 229.

(2) 10 Ex., 698; 24 L. J. (Ex.), 140.

(3) 28 L. J. (Ch.), 584.

(4) Law Rep., 1 Ex., 354.

(5) 3 H. & C., 544; 34 L. J. (Ex.), 57.

(6) 6 H. & N., 749; 30 L. J. (Ex.), 222.

(7) 31 L. J. (C. P.), 230; 12 C. B. (N.S.), 249.

(8) Law Rep., 1 Q. B., 628.

(9) Law Rep., 4 C. P., 70.

(10) Law Rep., 4 C. P., 184.

(11) Law Rep., 5 C. P., 738.

where the special circumstances existed, they were allowed. In *Gourley v. Plimsoil* ⁽¹⁾ and *Greenfield v. Reay* ⁽²⁾ the same principle was followed. Here the facts, as they appear from the defendant's own admissions, afford a special ground for questioning him in the manner proposed.

[FIELD, J., referred to *Anderson v. British Bank of Columbia* ⁽³⁾, as showing that, since the Judicature Act, 1873, s. 25, subs. 11, the practice with regard to discovery must conform to that in equity.]

The Judicature Act never intended to narrow the powers possessed by the courts of common law.

H. Mansel Jones, for the defendant, was not heard.

MELLOR, J.: We need not trouble the counsel for the defendant. If the question had been governed by the cases previous to the passing of the Judicature Act, 1873, I should have had some difficulty, for the facts brought before us seem to be very like the special circumstances which have been held to take the case out of the general rule. But I decline to go into all these cases, for I adopt the opinion of the Master of the Rolls in *Anderson v. Bank of British Columbia* ⁽⁴⁾. I think that the object and intention of the Judicature Act, 1873, was that the distinction between the practice in law and equity upon this subject should no longer prevail. The language of the Master of the Rolls is very clear. He says (14), "I have been referred to some decisions by judges of the common law courts upon this question. I do not intend to go through them in detail, for this reason: they all proceeded, as I understand, not upon the simple rule of equity, but upon the powers conferred on the judges by the Common Law Procedure Act. It was put in one of the cases especially by Mr. Justice Blackburn, that he did not consider that the rules of equity were binding upon them, but that they had a different power and a different discretion under the Common Law Procedure Act, and were entitled, if they thought fit, not to go so far as the courts of equity were in the habit of going. If that were so, those cases are now no authorities at all, *because, [528 since the Judicature Act, it must be taken to be conclusively settled by the Legislature that where there is any conflict between the rules of law and the rules of equity, the rules of equity are to prevail, and consequently even a tribunal composed of the same judges, as men though not the same judges in their character as judges, since they are now judges of the High Court, will be no longer governed by the clauses

⁽¹⁾ Law Rep., 8 C. P., 362.

⁽²⁾ Law Rep., 10 Q. B., 217.

⁽³⁾ 2 Ch. D., 644.

⁽⁴⁾ 2 Ch. D., at p. 654.

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of the Common Law Procedure Act, if those clauses conflict with the rules of equity, but will be governed by the rules of equity."

I think it would be entirely inconsistent with this view of the Judicature Act, 1873, s. 25, subs. 11, if we were to allow these interrogatories. The result is that the order of my Brother Lush was right, and must be affirmed.

FIELD, J.: I am of the same opinion. The plaintiff has in the exercise of a right conferred upon him by Order xxxi, Rule 1, delivered to the defendant certain interrogatories in writing, and the defendant has exercised his right, under Rule 5, of calling upon a judge to strike out these interrogatories. Now it must, first of all, be observed that in giving our decision we do not say one word about the law of discovery. The practice in discovery is entirely different. This is an application with reference to interrogatories, and as it has been the practice in the Court of Chancery to append interrogatories to a bill, one question which we have to consider is, whether these interrogatories would be allowed in the Court of Chancery. We find it laid down in Daniell's Ch. Prac., vol. ii, 5th ed., p. 1409, that in equity a bill for discovery which might expose the person interrogated to criminal proceedings is demurrable. Mr. Bowen very fairly said that the practice as thus stated could not be distinguished or overruled, but he relied upon the Common Law Procedure Act, 1854, s. 51, which, he contended, gave a larger power than existed in equity, and enabled the common law judges to allow questions which could not be put in equity. He fortified his argument by referring us to a number of cases, particularly *Bartlett v. Lewis* (¹). But it seems to me that when we refer to the Judicature Act, 1873, s. 25, subs. 11, we find a stronger authority against him. The Judicature Act has introduced *uniformity in the practice. We are to take as our model not the Common Law Procedure Act but the rules of equity, wherever there is any conflict between the act and these rules. Now, it is well established in equity that a bill of discovery for the purpose of obtaining the information which is asked for here would be demurrable, that is, the Court of Chancery would not allow the defendant to be harassed by having to answer such questions, but would prevent them from being put. I think that this rule is now binding upon us, and that the order was right.

LUSH, J.: After having heard this case very fully argued, I remain of the same opinion which I expressed at cham-

(¹) 12 C. B. (N.S.), 249; 31 L. J. (C.P.), 230.

bers. In a number of cases decided before the Judicature Act, the common law judges thought that they had larger powers than the Court of Chancery in allowing interrogatories to be administered to the parties in an action. But the Judicature Act, 1873, intended to amalgamate the rules and introduce uniformity of procedure. At the date of the act there was a difference in the procedure affecting interrogatories. In the common law courts the judges thought that they had larger powers than the equity judges, while Mr. Bowen admits that the courts of equity would have sustained a demurrer to such interrogatories as these, that is, would not even have allowed them to be put. There was, therefore, a variance between the rules of equity and the rules of common law with reference to the same matter. Now s. 25 of the act says that where there is such a variance equity shall not conform to the common law, but the common law shall conform to equity. We must, therefore, follow the practice of equity, and prevent such interrogatories from being put.

Application refused.

Solicitors for plaintiffs: *J. & F. Needham.*

Solicitors for defendant: *Freshfields & Williams.*

[2 Queen's Bench Division, 530.]

June. 12, 1877.

***WEBB, Appellant; KNIGHT, Respondent. [530]**

Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6—Adulteration—Gin diluted with Water.

The appellant, a publican, was convicted under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, for "selling to the prejudice of the purchaser a pint of gin which was not of the nature, substance and quality of the article demanded by such purchaser." A person asked for a pint of gin at the appellant's premises. The appellant said that he had gin at 2s. and 1s. 4d. per pint. The purchaser bought a pint at the latter price. On analysis the gin was found to contain 43.15 per cent. of water, that is, it was 43.15 below proof, but the mixture was not injurious to health. The magistrate found that there was no recognized standard of alcoholic strength for gin, but that it varied from proof to 20 under proof:

Held, that whether the mixture in question was what a purchaser buying gin without any further description would reasonably expect to receive was a question of fact for the magistrate; and that there was sufficient evidence to justify the conviction.

CASE stated under 20 & 21 Vict. c. 43, by the stipendiary magistrate for the district of the borough of Stoke-upon-Trent.

Upon the hearing of an information preferred by the respondent against the appellant, under s. 6 of 38 & 39 Vict.

c. 63⁽¹⁾, charging that the appellant "unlawfully did sell, 531] to the prejudice *of one William Gifford, the purchaser of a certain article of food, to wit, one pint of gin, which was not of the nature, substance, and quality of the article demanded by such purchaser," the magistrate convicted the appellant.

The following facts were proved: W. Gifford, the assistant to the respondent, who is the authorized inspector under 38 & 39 Vict. c. 63, went to the appellant's licensed premises, known as the Nile Street Hotel, at Burslem, on the 7th of November, 1876, and asked for a pint of gin. The appellant's barman, J. Ward, asked Gifford at what price he wanted it, stating that they had it at 2s. and 1s. 4d. per pint. Gifford selected a pint at 1s. 4d., which was supplied to him. He admitted, on cross-examination, that the prices of gin varied from 2s. to as low as 1s. 1d., and that he had purchased gin for analysis as low as 1s. Gifford then divided the pint of gin into three parts, two of which were sealed by the appellant and retained by Gifford. The other portion was sealed by Gifford and left with the appellant. Gifford at the time he sealed the samples marked them.

The two marked samples of gin were handed to the respondent on the same day, and on the 10th of November,

(1) 38 & 39 Vict. c. 63, s. 6: "No person shall sell to the prejudice of the purchaser any article of food, or any drug which is not of the nature, substance and quality of the article demanded by such purchaser under a penalty not exceeding twenty pounds, provided that an offence shall not be deemed to be committed under this section in the following cases:

"(1.) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof.

"(4.) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation."

Sect. 7: "No person shall sell any compound article of food or compounded drug which is not composed of ingredients in accordance with the demand of

the purchaser, under a penalty not exceeding twenty pounds."

Sect. 8: "Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or convert its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice by a label distinctly and legibly written or printed on or with the article or drug to the effect that the same is mixed."

Sect. 25: "If the defendant in any prosecution under this act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution," &c.

1876, the respondent handed the two samples to Mr. Wentworth Scott (the duly authorized analyst for the district) for analysis.

On the 18th of November, 1876, the analyst forwarded his certificate of analysis to the respondent, of which the following is the material part:—

“Sale of Food and Drugs Act, 1875.

“Sample of gin,

“Marked A 584, sealed, with key.

“Received November 10th, 1876.

“From J. E. Knight, Food Inspector.

“I hereby certify that I have analyzed chemically, and have *otherwise examined the sample of gin referred [532 to above, and that I find the same very largely adulterated, the under-mentioned percentages or proportions of foreign ingredients being present therein.

“Water 43.15 per cent (').

“In my opinion the said sample is not so adulterated as to be injurious to health.”

The appellant called witnesses and proved that when he bought the gin of the distillers it was 17 under proof, and that it was the custom of the trade in this district to purchase gin at degrees varying from 17 to 22 degrees under proof, and that the prices at which gin is usually sold by the trade in the district are for the best gin 2s., and for common gin 1s. 4d. and as low as 1s.

On the part of the appellant, it was further contended that the article of food, namely, the pint of gin sold to Gifford as the purchaser, could not be to the prejudice of the purchaser, as he had selected a low priced gin, and that he got his value in genuine spirit, diluted only by the addition of water to accommodate the purchaser in the price to be paid, and that therefore he got a more diluted or less strong spirit, and that it was a well known fact that in the sale of gin the custom of the trade was that pure gin was an article not sold for consumption in licensed houses, and that there was no standard of alcoholic strength retailers were required to sell, and that under all the circumstances, the custom regulating the traffic in gin could not be affected by the before named statute.

On behalf of the respondent, it was contended that when a purchaser asked for gin it was to the prejudice of the purchaser if he got gin mixed with a large percentage of water.

(') It was admitted in the argument proof gin, or, in other words, that it was that by this it was meant that the mixture 43.15 per below proof. contained 43.15 per cent. more water than

The magistrate, however, was of opinion that when a purchaser asked for gin he did not expect to be supplied with gin and a large percentage of water added thereto by the vendor, and that though there is no recognized standard of alcoholic strength for gin, but that it varies from proof to 20 under proof, a purchaser may well believe that when he asks for best gin he will obtain that of a strength of about 533] proof or a few degrees under, and *when he asks for lower priced gin he will obtain gin of a quality between that and 20 under proof; at any rate if he ask for gin he might expect to obtain an article not more than 20 or 22 under proof. If the contention of the appellant were right, there would be no limit to the amount of water he might be entitled to add, because it was admitted in evidence that gin was sold at a less price per gallon than was paid for it, and that the profit was made only by the quantity of water that was added to the gin after it was received from the distillers. The magistrate was of opinion that such a contention was contrary to the decision in *Pashler v. Stevenitt* (¹), and he consequently gave his decision against the appellant.

The question for the opinion of the court was whether the pint of gin and water sold to Gifford as gin was to the prejudice of the purchaser within the meaning of the act.

April 14. The case came on for argument and was remitted to the magistrate to say whether the liquid sold was of the nature, substance, and quality of the gin usually sold at that price in the neighborhood.

The magistrate amended his statement as follows:—

“As to whether the liquid sold was of the nature, substance, and quality of gin usually sold at that price in the neighborhood, I can only refer to several other cases of a similar character to the present awaiting to abide the decision of the High Court of Justice in this case, and by consent using the certificates, as also the prices paid for the gin in each case, of which the following is a list:—

Prices paid.	Name of Vendor.	Percentage of Water.
2/ per pint.	Hannah Bell	29.8 per cent.
1/10 “	Joseph Bosworth	31.5 “
1/4 “	Elizabeth Hancock	32 “
1/ “	Charles Lockett	51.10 “
2/ “	Thomas Pover	44.18 “
1/4 “	Charles Green	40.30 “
1/8 “	Albert Turner	52.28 “

(¹) 35 L. T. (N.S.), 862.

"I convicted the appellant, inasmuch as he had not brought himself within the exception of the 25th section of the act."

**Poland*, for the appellant: The conviction was [534 wrong. The appellant is not shown to have sold an article which was not of the nature, substance, and quality of the article demanded by the purchaser. What he sold was gin, though it was perhaps weaker than might have been obtained elsewhere. [He was then stopped.]

Bosanquet, for the respondent: There is sufficient evidence to justify the conviction. The case might have been stated more clearly, but it is evident that there was no proof of a custom in the trade to mix all common gin with water before offering it for sale. *Pashler v. Stevenitt* (1) is in point. There the defendant, who was convicted under s. 6, had sold as gin a liquid composed of alcohol, water, and sugar in different proportions. Evidence was adduced that gin was sold by retailers at strength varying from proof to 20 per cent. under proof. The liquid was 44 per cent. under proof, and the analyst said he should call it gin whose alcoholic strength was exceedingly low. The court upheld the conviction, Cleasby, B., saying that the justices had come to the conclusion that the mixture was not of the quality of gin as known commercially, and that it was impossible to say that they were wrong; and Grove, J., that the court could not decide upon the evidence whether the case came within the first exception in s. 6 or not, for that this was a question of fact for the justices.

Poland, for the appellant: Here a low priced gin was asked for, a circumstance to which due weight must be given.

[MELLOR, J.: The purchaser did not ask for gin of any particular quality.]

It cannot be said that he did not get what he asked for. Water is not a foreign ingredient; all gin must contain a certain proportion of it. The section is intended to prevent the sale of a different article in place of that required by the purchaser.

MELLOR, J.: I should have been better satisfied if the magistrate had found the facts which we requested him to find. But I think that enough is shown in the case to justify the conviction. The appellant was at liberty, if it were possible for him to do so, to prove that gin like his own was commonly sold in the *neighborhood. He did not [535

(1) 35 L. T. (N.S.), 862.

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attempt to give any such evidence. I agree with the observations of the judges in *Pashler v. Stevenitt* ('), that the question whether the article is that demanded by the purchaser is one of fact for the justices; and although there is no appeal from our decision, we ought to follow the decision of a co-ordinate court unless we strongly disapprove of the grounds on which it proceeded. So far from this being the case, I think that the decision follows both the law and common sense.

LUSH, J.: I am of the same opinion. We have to decide the point without the information, to obtain which we sent back the case, but I think it is sufficiently clear that the conviction was right. The term "food" by s. 2 includes every article used for food or drink by man, and although Mr. Poland has argued that the mixture is not a different article from that demanded, because gin is a compound article mixed with water, I think it must always be a question for the magistrates whether the amount of dilution is in excess of what is reasonable, or in other words, it was for them to say what quantity of water a purchaser may reasonably expect to find mixed with gin. No one, asking for gin, generally, without further description, can expect to get a bottle of proof spirit, but the magistrate has in effect found here that a purchaser would not reasonably expect to be supplied with gin containing so large a percentage of water as the sample in question. I think we must give judgment in accordance with this finding, which makes the case very similar to that of *Pashler v. Stevenitt* (').

Judgment for the respondent.

Solicitor for appellant: *Henry Tyrrell.*

Solicitors for respondent: *White & Sons.*

(') 35 L. T. (N.S.), 862.

[2 Queen's Bench Division, 544.]

April 20, 1877.

[IN THE COURT OF APPEAL.]

544] *THE QUEEN V. MONCK and Another, Justices of Berkshire.

Municipal Corporations Act (5 & 6 Wm. 4, c. 76), s. 117—"Borough "liable to contribute in whole or in part to County Rate"—District liable to County Rate added to Borough by 2 & 3 Wm. 4, c. 64.

By the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, s. 117, the treasurer of every county in England and Wales shall keep an account of all sums of money received in aid or on account of the county rate, and of the sums of money ex-

pended out of the county rate for other purposes than the cost arising out of the prosecution of offenders committed for trial in such county, and in the case of boroughs having a separate court of quarter sessions of the peace, other than out of coroner's inquests; and shall not more than twice in every year send a copy of the said account to the council of every borough situate within such county in which a separate court of quarter sessions of the peace shall be holden, and which, before the passing of 2 & 3 Wm. 4, c. 64, was chargeable with or liable to contribute in whole or in part to the county rate of such county; and shall make an order on the council of every such borough for the payment of such proportion of such sums as would have been chargeable, after deducting all sums of money received in aid of the county rate as aforesaid, if this act had not passed upon such borough as the same shall be bounded according to the provisions of this act.

Before the passing of 2 & 3 Wm. 4, c. 64, the borough of New Windsor included part of the parish of Clewer in Berks, which was exempt from the county rate, and on the passing of that act a further part of the parish of Clewer, which part up to that time had been chargeable with the county rate, was added to the parliamentary borough. With this exception no part of the borough was liable to contribute to the county rate. Upon the passing of 5 & 6 Wm. 4, c. 76, the boundaries of the municipal borough were made coextensive with those of the parliamentary borough. The borough has a separate court of quarter sessions, and a charter containing a non-intromittant clause:

Held, affirming the judgment of the Queen's Bench Division, that the borough of New Windsor was liable to contribute to the account for "other purposes" in respect of the part of the parish of Clewer which, before the passing of 2 & 3 Wm. 4, c. 64, was chargeable with county rate.

DEMURRER to return to mandamus to justices of Berkshire, commanding them to hear a complaint of the treasurer of the county against the treasurer of the borough of New Windsor, for non-payment of certain moneys. The following were the material facts upon the record.

Prior to 1832, the borough of New Windsor, in the county of Berks, consisted of the parish of New Windsor and of part of the parish of Clewer which had never been liable to the county rate. *The borough had from time be- [545 yond memory a separate court of quarter sessions, and its charter contained a non-intromittant clause.

By the Boundries Act, passed in 1832 (2 & 3 Wm. 4, c. 64), a further part of the parish of Clewer, which part had previously been liable to the county rate, was added to the borough for parliamentary purposes, but still remained for all other purposes part of the county.

By the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, the boundaries of the municipal borough of New Windsor were made coextensive with those of the parliamentary borough; the borough of New Windsor thenceforth consisting, for all purposes, of the parish of New Windsor, and of a part of the parish of Clewer, both of which had never been liable to the county rate, together with the further part of the parish of Clewer, which had been liable to county rate (').

(') By the Municipal Corporation Act, of every county in England and Wales 5 & 6 Wm. 4, c. 76, s. 117, the treasurer shall keep an account of all sums of money

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In June, 1875, the treasurer of the county of Berks made an order on the council of the borough of New Windsor for payment of its proportion of the account under 5 & 6 Wm. 4, c. 76, s. 117 (commonly called "the other purposes account"), and afterwards made complaint to two justices of the county that the council had refused to pay the sums specified in the order, and required the justices to hear and [546] determine the complaint and to issue a *warrant for the payment of the amount. The justices refused to issue the warrant.

A rule having been obtained by the treasurer of the county calling upon the justices to show cause why a mandamus should not issue commanding them to hear and determine the complaint, the Queen's Bench Division after argument made the rule absolute: *Reg. v. New Windsor* (').

The mandamus was accordingly issued and a return made by the justices on behalf of the treasurer of the borough. To this return there was a demurrer. The facts stated in the mandamus and return are substantially those which were before the court in *Reg. v. New Windsor* (').

Formal judgment on the demurrer was given for the prosecution without argument. The defendants brought error.

April 19. *Matthews*, Q.C., and *Bullen*, for the defendants, used arguments similar to those in *Reg. v. New Windsor* ('). They also cited as to the jurisdiction of county magistrates, *Blankley v. Winstanley* ('); *Bates v. Winstanley* ('). As to the levying of the county rate, *Mercer v. Davis* ('). As to the liability of part of a borough, *James v. Green* ('); *Weatherhead v. Drewry* ('); *East Looe v. Cornwall* (').

Cave, Q.C., and *H. D. Green*, for the prosecutors.

received in aid or on account of the county rate, and of the sums of money expended out of the county rate for other purposes than the costs arising out of the prosecution, &c., of offenders committed for trial in such county, and in the case of boroughs having a separate court of quarter sessions of the peace, other than out of coroner's inquests, and shall not more than twice in every year send a copy of the said account to the council of every borough situate within such county, in which a separate court of quarter sessions of the peace shall be holden, and which before the passing of 2 & 3 Wm. 4, was chargeable with or liable to contribute in whole or in part to the county rate of such county, and shall make an order on the council of every such borough for the

payment of such proportion of such sum as would have been chargeable, after deducting, &c., if this act had not passed, upon such borough as the same shall be bounded according to the provisions of this act, and the council of such borough shall forthwith order the same, with all reasonable charges of making and sending the said account, to be paid to the treasurer of such county out of the borough fund.

(1) 1 Q. B. D., 152.

(2) 3 T. R., 279.

(3) 4 M. & S., 429.

(4) 10 B. & C., 617.

(5) 6 T. R., 228.

(6) 11 East, 168.

(7) 3 B. & S. 20; 31 L. J. (M.C.), 245.

April 20. LORD COLERIDGE, C.J.: In this case we do not think it necessary to trouble Mr. Cave with any further argument. I may be permitted to say that, as far as I am capable of judging, Mr. Matthews' argument has exhausted the case, and he has said everything that is possible to be said on his side. For a considerable period of his argument I was of opinion that his construction was right, but on further consideration I am of a different opinion, though I do not mean to say that there are not difficulties.

This was a mandamus to two justices of Berkshire, ordering them to hear and determine a complaint of the county treasurer against the treasurer of the borough of New Windsor for *non-payment of a certain proportion of [547 money which had been expended for purposes other than the prosecution, maintenance, conveyance, and transport of felons. The question arises upon the 117th section, and the sections connected with it, of the first Municipal Corporation Act, 5 & 6 Wm. 4, c. 76. The important words are, that the treasurer of every county shall keep an account of all sums of money received in aid or on account of the county rate, and of the sums of money expended out of the county rate for other purposes than those which I have just described; and twice a year he shall send a copy of the account to the council of every borough situate within such county in which a separate court of quarter sessions of the peace shall be holden, and which before the passing of the Boundaries Act "was chargeable with or liable to contribute in whole or in part to the county rate of such county," and shall make an order on the council of every such borough for the payment of such proportion of such sum as would have been chargeable, after deducting all sums of money received in aid of the county rate, if this act had not passed. The question is, whether these words apply or do not apply to the borough of New Windsor, as such a borough.

The borough of New Windsor has had, time out of mind, a separate quarter sessions of the peace. At the time of the passing of the Boundaries Act a certain portion of the parish of Clewer (which I will for shortness call Clewer), which had been theretofore part of the county of Berks, was annexed to the borough of New Windsor, and for the purposes of parliamentary representation was made part of the borough of New Windsor. Then came the Municipal Corporations Act, which said in effect that those portions of the boroughs as constituted by the Reform Act for parliamentary purposes should be portions of the boroughs for municipal purposes under the Municipal Corporations Act,

and thereby the Clewer portion of Berks became a portion of New Windsor, not only for parliamentary purposes, but for municipal purposes also. No doubt before the passing of the Boundaries Act the portion of the parish of Clewer now under consideration, as it was a portion of Berkshire, did contribute to the county rate. It is also equally clear that the borough of New Windsor, as a borough, did not 548] before the passing of the Boundaries Act, "in whole or in part," contribute to the county rate. The question, therefore, is, was New Windsor at the time of the passing of the Municipal Act a borough which in whole or in part had before the passing of the Boundaries Act contributed to the county rate? That depends upon how the words "chargeable with, or liable to contribute in whole or in part to the county rate of such county," are to be construed. If they mean the borough as a borough, it is perfectly clear that as New Windsor did not as a borough "in whole or in part" before the passing of the Boundaries Act contribute to the county rate, it would not be a borough within the meaning of this section of the Municipal Corporations Act. If on the other hand the expression is to be construed as expressing the area of the borough, then New Windsor was a borough, part of the area of which did contribute to the county rate before the passing of the Boundaries Act. The whole question, therefore, really turns upon the true construction to be given to those words.

Now there are grave considerations, I admit, in favor of the construction for which Mr. Matthews contends. He said that there were boroughs which had not the benefit of a non-intromittant clause before the passing of the Boundaries Act, and were subject to the county rate, and had always paid part of it. Further he said, and he gave us the example of Leicester, that there were some boroughs in which the borough was composed of two parts—a part with regard to which there was a non-intromittant clause, and a part in which there was no such clause—and these boroughs in part contributed to the county rate, that is to say, they contributed as to that part of them with regard to which there was no intromittant clause; and his argument, if there were no countervailing considerations, was valid. There are boroughs which meet both parts of the definition, which he contends must be confined to such boroughs, and he says that the act ought not to be extended to make liable portions of a borough which had been exempt from payment of the county rate. Further, it was said, or suggested, that inasmuch as this payment was to be made by the borough

fund, that is, by the whole borough, the consequence must inevitably follow that boroughs which heretofore had been exempt from payment of the *county rate would be [549 now made liable to pay at least so much of the county rate as the newly added area heretofore had paid. Mr. Matthews is right in saying that in the great majority of the boroughs that consequence would follow. Now that, no doubt, is very strongly in favor of the construction for which Mr. Matthews is contending. Further, I believe he is right in saying that, until this decision, a contrary view of the statute has rather been taken for granted, and, at all events, in a great many instances the county treasurers have acted upon what the Court of Queen's Bench, in the case of *Reg. v. New Sarum* (¹), supposed to be the law. I think I have stated substantially the argument which Mr. Matthews has put forward, and I say that it is a strong argument and might prevail if it were not for considerations that overpower it. First of all, it is important to see whether the construction will serve for the whole of the act; and if it will not, that would be an argument against it; if it will serve for the whole act, this, to my mind, might be an argument in its favor. We have had our attention drawn to s. 141, which deals with the case of boroughs which were not incorporated at the time of the passing of this act, such as Birmingham, Manchester and Brighton. Brighton was a strong case, because Brighton, within the memories, if not of ourselves, yet within the memories of our fathers, was a mere fishing village, and not only had no parliamentary representation, but was not, in any sense, a borough. Sect. 141 deals with places of that sort, and says there are sundry towns in England which it is desirable should be corporate towns, and points out a mode by which the Crown is empowered to create corporations in these towns, and then it goes on to say that "It shall be lawful for His Majesty by any charter, if he shall think fit, by the advice of his Privy Council, to extend to the inhabitants of any such town or borough within the district to be set forth in such charter the powers and provisions in this act contained." Of course it is true that that might mean only such powers and provisions as could be extended, and as the question is whether this power can or cannot be extended, I do not think it was evidently contemplated that this power would be, as it has been, extensively used; and it seems to *me to be an argu- [550 ment against one construction of the 117th section, that if Mr. Matthews' view be correct, then that provision cannot

(¹) 7 Q. B., 941; 15 L. J. (M.C.), 15.

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be extended to any new boroughs because it can only be extended to boroughs which as boroughs contributed in whole or in part to the county rate before the passing of the Boundary Act. Of course a borough taken entirely out of the county area could not, in that point of view, be within the provisions of the 117th section; and this seems to be a reason for construing the section according to Mr. Cave's view of the case, because it presents no difficulty. If it be that the area of the borough, before the Boundary Act, contributed "in whole or in part" to the county rate—if that is the true construction—it applies to a case like Brighton, because the whole area of Brighton did contribute to the county rate before the passing of the Boundary Act, whereas if Mr. Matthews' construction is adopted it cannot be so applied. That seems to be an argument not entirely without weight. That this act can be applied, and that the provision of the act in the 117th section can be applied to the case of a new borough, is, as I understand it, distinctly decided in the case of *Reg. v. Birmingham* ⁽¹⁾. I am unable to understand that case except upon the view that the Court of Queen's Bench must have thought that an entirely new borough might be made to contribute to what has been shortly called the account for "other purposes," although no part of it as a borough had contributed to the county rate because it had not previously an existence as a borough. Therefore it seems to me that as far as a wholly new borough is concerned, the case of *Reg. v. Birmingham* ⁽¹⁾ is directly in point on the construction of this section. If that be so as to the whole of the borough, what is there to make us come to a different conclusion when the question is not as to the whole, but as to part? I confess I cannot see.

But, apart from the authority of that case, and apart from the construction I have suggested, is there or will there upon the whole be anything like real injustice effected by the construction which we put upon this statute? At first, I own I was disposed to think that there would be, and if it is unjust, as we have sometimes heard, to subject persons 551] *de novo* to a burden which, whether *for good or ill reasons, they have hitherto escaped, then unjust this act undoubtedly is, because it subjects for the first time a number of persons who have been hitherto exempt, to a burden which they will have to bear. But I do not think it is unjust, if there was really no reason for the exemption, and if one can see that the exemption arose merely from the failure of the jurisdiction to enforce payment from people who,

⁽¹⁾ 10 Q. B., 116; 17 L. J. (M.C.), 56.

as far as reason goes, ought to have paid. As pointed out by Blackburn, J., the inhabitants of great boroughs in a county have really had for more than a century at least, the benefit of county expenditure in a great many ways without contributing to it, and they have not contributed to it because there was no means known to make them contribute. They have not to contribute even now to the same extent to which other inhabitants of the county have; but if for the general purposes of that borough and for the general advantage of that borough a piece of the county has been brought under the authority of the borough justices on the one hand, so on the other hand the authority of the county justices is indirectly brought in over the whole of the borough in respect of such portion of the county as has been made part of the borough, and to the extent to which that portion of the county has heretofore contributed to the county expenses.

I think that Mr. Cave's construction is one which the words will bear, but I think that if there were merely grammatical considerations to be taken into account the balance of opinion would be in favor of Mr. Matthews' construction. But that cannot be so; we must look at the whole of the act. We must look at the practical operation and must see if the construction we are about to give is one which the words will fairly bear, and is one which other considerations, common sense, reason, and authority warrant us in putting. It appears to me that those considerations do warrant me in putting this construction on the statute.

I am, therefore, of opinion that the judgment of the court below was correct, and that it must be affirmed.

BRAMWELL, J.A.: I am of the same opinion. At first I also thought that the judgment of the court below was wrong. I thought so for a reason which has been entirely displaced, and now *I have come to an opposite con- [552] clusion with a feeling of certainty that my opinion is correct. The ground on which I thought the judgment was wrong at first, was this—I read the words “liable to contribute in whole or in part to the county rate” as meaning that the borough as a borough was liable to contribute to the whole or a part of the county rate. But that is an impossible construction, because there was no borough in that plight, and therefore the words “in whole or in part” must be applied not to the rate, but to the borough. That being so, my original opinion has entirely gone, and I have come to an opposite conclusion for reasons which I now state. In the first place, it seems to me manifest that new boroughs, the creation of which the statute contemplates, unless there has

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"De minimis non curat lex;" and the Legislature may well have thought as Godmanchester and Huntingdon had cast in their lot together, they should fraternally bear each other's burdens in equal proportions. Therefore, although there is that argument, it does not weigh with me sufficiently to induce me to come to a conclusion which would involve a much greater and more grievous injustice, namely, such an injustice as I pointed out in the case of a new borough, like Brighton. Therefore, I am of opinion that the judgment should be affirmed.

BRETT, J.A.: It seems to me that Mr. Matthews' argument really was that unless the construction for which he contended was adopted injustice would be done, and that if the construction for which he contended was adopted there were boroughs to which the statute would be applicable. Now, I think it will be seen as to the first point for which he contended, that he did not bring it within the rule which is applicable to construction when you are relying on the doctrine of injustice, which rule, I apprehend, is this: 555] *Where a statute is capable of two constructions, one of which will work manifest injustice, and the other will work no injustice, you are to assume that the Legislature intended that which would work no injustice. But where the injustice relied upon may be called, if it is injustice at all, injustice to one class, and the opposite construction would apply the same kind of injustice to another class, then this is no argument at all; neither is it any argument unless the injustice is manifest so that it must have been present to the mind of those who were passing the act of Parliament. The first observation that strikes me is this: Wherever it is necessary to use so elaborate an argument as was used to prove that there is injustice, that of itself shows that the injustice is not manifest; secondly, I do not think that Mr. Matthews has succeeded in showing, in this case, that there is any injustice if the construction which would be against him be adopted. The injustice he relies upon is that certain persons who, until this statute was passed, and other things were done, had not to contribute to the county rate, would now have to contribute to the county rate. I rather agree with my Lord that the mere fact that you are imposing a tax on people is no injustice at all, for the taxes must be imposed. But I think there is another defect in Mr. Matthews' argument as to injustice in this case. In the first place, if it be injustice at all, according to his construction it would be injustice to the boroughs which he says were within the act, and precisely the same

injustice to the boroughs to which additions were made by the statute which has been discussed. Secondly, I think he omitted in his considerations of injustice the injustice done to the county. He relied entirely on the injustice done to the borough, but forgot altogether the injustice, if it be an injustice at all, which on the opposite view is done to the county; for if it be unjust to impose on people within the borough a larger burden than was imposed on them before, then, according to Mr. Matthews' construction, there would be a large burden imposed on all the people in the county who are outside that part which is thrown into the borough. If the same rate is to be maintained there are fewer of them to bear it, therefore the burden on them must be larger. Again, it seems to me that the history of the case rather shows that what is being done instead of being an injustice is a restoration *of justice, for, as pointed out by Blackburn, [556 J., the only reason why the people within a borough which had separate or distinct justices had not to contribute to the county rate was the technical reason that the county justices could not levy the rate. That, as long as it lasted, seems to me to have been unjust, for it must be admitted on both sides that the inhabitants of the borough being also inhabitants of the county had the benefit of what was done by the county, and only escaped from paying the rate by reason of that technical difficulty. If, therefore, this statute has done away with that technical difficulty and has made all those who inhabit the borough liable to the county rate, it seems to me rather a restoration of justice than a doing of injustice. Again, in the case of boroughs absolutely new, on Mr. Matthews' construction, the injustice would be greater and more manifest than in any that have been shown. The case of Brighton has been alluded to; the case of Birmingham is the same, because although Birmingham was a borough it was only so in name; and to say that because they become boroughs and corporate bodies with separate magistrates therefore they are to have the benefit of county bridges and county expenditure and contribute nothing to them, as I have said before, seems to me to be really and manifestly unjust; whereas the injustice of which Mr. Matthews complains is certainly not manifest, and in my opinion does not exist. The argument, therefore, on which he relied, and which he elaborated so skilfully, fails to impress my mind.

As to the second matter—viz., that there were boroughs to which, according to his construction, the act was applicable, I think that he made it out that there were such boroughs; but the vice of that argument is that if the prop-

osition for which he contends was decided against him it would be fatal to him, because there would be nothing else but the boroughs which he wishes now to defend for the statute to apply to. Mr. Cave saw that, and tried to show that there were no boroughs except those under discussion to which the act would apply. I confess I think that Mr. Cave failed there, and that Mr. Matthews succeeded. But it would be fatal to Mr. Matthews if this were decided against him, though he may not succeed if it is decided in his favor. To succeed, he must not only show that there 557] are other boroughs to which the *statute would be applicable if his construction was correct, but that there is not a second class to which it would be applicable; because if there are two boroughs to which the construction of the act is applicable, we must look further to see what that construction is. Therefore, in my opinion, the argument of Mr. Matthews fails, and we are left after all to construe this section according to ordinary rules. My view of this section really is that there is only one borough mentioned in the section, whereas Mr. Matthews' construction would oblige you to say that there are two boroughs mentioned in the section. There is the present existing borough to which addition has been made by the Boundaries Act. That is one borough. There was another borough before the addition by the Boundaries Act—there was another borough which did not contain that part which has been added since the passing of the Boundaries Act, but those are two boroughs different in dimension, and it seems to me that you cannot read this section as Mr. Matthews would wish to read it, unless it speaks in one part of the existing borough, and in the other part of the borough which existed before the addition under the Boundaries Act. The words of the section are—and shall “send a copy of the said account to the council of every borough”—now, what borough is that? It seems to me manifest that that is the borough now existing. It goes on—“of every borough situated within such county in which a separate court of quarter sessions of the peace shall be holden; and which”—Now what is the grammatical construction of the relative? It clearly refers to the very borough mentioned before, that is, the present existing borough. If so, then the only way after the admission of Mr. Matthews, in which you can apply the words “in whole or in part,” to the existing borough, is to say that those words “in whole or in part” apply to locality, and if they apply to the existing borough they must mean this and cannot mean anything else—the

area which is now within the ambit of the existing borough. If that be so, and there can be only one borough, the question must be whether those who are within the area of the present existing borough or within the area of part of the present existing borough, were before the Boundaries Act liable to be rated for the county rates. That is the only way in which it seems to me you can read this section, and I come to the *conclusion that that must be the meaning of [558 the words which are in dispute. That seems to me to be the foundation of the decision in the case of *Reg. v. Birmingham* (*)—that those words “in whole or in part” mean the area which is now within the existing borough. I think that that case is right, inasmuch as that construction does not break any rule of grammar or any ordinary rule of construction, and is not open to the objections within which Mr. Matthews tried to bring it, and that it works no manifest injustice. Therefore, I am of opinion, that the judgment of the Queen's Bench Division was right and must be affirmed.

Judgment affirmed.

Solicitors for the prosecution: *Newman, Stretton & Co.*, for Morland & Son, Abingdon.

Solicitor for the defendants: *Lott*, for H. Darvill, Windsor.

(*) 10 Q. B., 116; 17 L. J. (M.C.), 56.

As to the effect upon property, and the different corporations where towns and other municipal corporations are divided, new corporations created, etc., see 1 Dillon's Munic. Corp., §§ 87, 80, 123, 127-9; Harrison's Munic. Manual (4th ed.), pp. 17, note (a), 21-7, 42-6; *Wellington v. Wilmot*, 17 Up. Can. Q. B., 71.

See the elaborate opinions of the arbitrators in the matter of the division and adjustment of debts and assets of Upper and Lower Canada, on the passage of the consolidation act of 1867, 2 *Revue Legale*, 190-218.

As to the legality of a tax levied by a new corporation when its creation was illegal, see *Hart v. Vespa*, 16 U. C. Q. B., 32.

The question as to how, if at all, debts and property shall be divided and apportioned between an old and a new municipal corporation is one exclusively for the legislature: *Com'rs v. Bunker*, 16 Kans., 498; *Com'rs v. Bailey*, 11 Kans., 631; *Com'rs v. Com'rs*, 79 N. C., 565.

See *Com'rs v. Bailey*, 13 Kans., 600; *Wellington v. Wilmot*, 17 Up. Can. Q. B., 71.

Where a town is divided, and a new town created out of a part of the territory of the old town, the latter is liable, unless provision is otherwise made by statute for all the debts, and cannot compel contribution by the new town: *Depere v. Bellevue*, 81 Wisc., 120; *Crawford Co. v. Iowa Co.*, 2 Chandel., 14, 2 Pinney, 368; *Town of Milwaukee v. City of Milwaukee*, 12 Wisc., 93; *Briggs v. School Dist.*, 21 Wisc., 348; *Laramie Co. v. Albany Co.*, 92 U. S. Rep., 307, 312-315 and cases cited, affirming 1 Wyoming, 137; *Windham v. Portland*, 4 Mass., 389; *County of Richland v. Co. of Lawrence*, 12 Ill., 8; *Cem'rs v. Bunker*, 16 Kans., 498; *Commissioners v. Commissioners*, 79 N. C., 565.

See *Wellington v. Wilmot*, 17 U. C. Q. B., 71.

Real estate conveyed to and paid for by a school township remains its property, notwithstanding such real estate

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is included in territory subsequently annexed to a city adjoining where such annexation includes part only of the territory of such township: *Reckert v. Peru*, 60 Ind., 478; *Heizer v. Yohn*, 87 Ind., 415; *Inhabitants v. Richardson*, 28 Pick., 62; *Whittier v. Sanborn*, 38 Maine, 32; *Township v. Saginaw*, 9 Mich., 41.

Otherwise, where the old town is entirely extinguished: *School Dist. v. Tapley*, 1 Allen, 49; *Carson v. State*, 27 Ind., 465, as explained in *Heizer v. Yohn*, 87 Ind., 420.

As to the remedy by the old county against the new when the statute provides that each county shall pay half of an existing indebtedness, see *Iowa Co. v. Greene Co.*, 1 Pinney, 518.

See *Wellington v. Wilmot*, 17 U. C. Q. B., 71.

As to remedy by township A. against township B. for a debt agreed to be paid by B. to A., on their separation, out of a fund supposed to be coming to the two towns from the county, which county debt subsequently proved not to have existed, see *Aaron v. Amabel*, 17 Grant (U.C.), 163, disapproving, on rehearing, *S. C.*, 15 Grant's (U.C.) Chy., 701.

As to assessment of part of debt of old county on inhabitants of that portion thereof set off to another county, instead of the whole county to which it is annexed, see *Commissioners v. Commissioners*, 79 N. C., 565; *Commissioners v. Ballard*, 69 N. C., 18; *Moore v. Ballard*, 69 N. C., 21; *Manney v. Com'rs*, 71 N. C., 486; *Blount County v. Loudon County*, 8 Heisk. (Tenn.), 854.

See *Wellington v. Wilmot*, 17 U. C. Q. B., 71.

And it has been held, that such assessment should be levied by the old county as if no separation had taken place, and that a bill in equity would not lie to compel the new county to levy taxes to pay such *pro rata*: *Blount Co. v. Loudon Co.*, 8 Heisk. (Tenn.), 854.

As to the consolidation of two cities or towns, provisions as to debts and properties of each, etc., see *Stone v. Charlestown*, 114 Mass., 214; *Norton v. City of Boston*, 119 Mass., 194; *Wellington v. Wilmot*, 17 U. C. Q. B., 71.

As to division of gratuity, subsequently voted to reimburse towns for bounty paid to volunteers, between old and new towns, under statute providing for division of property, debts, etc.: *Sanbornton v. Tilton*, 55 N. H., 603, 58 N. H., 438.

As to the remedy against the new corporation for negligence by one of two old municipal corporations consolidated into one, and requisites of the complaint, see *Adams v. City of Minneapolis*, 20 Minn., 484.

Where, after taxes were levied and assessed, the territory was set off into a new county, held the collection of such taxes was legal, and when collected they belonged to the parent county: *Del., etc., Railroad Co. v. Aten*, 8 Luzerne Leg. Reg., 55, 1 Lackawanna Leg. Record, 172, 236.

As to the effect where, after a municipal corporation contracted for certain work to be assessed on parties benefited, the territory was annexed to another corporation which completed that and additional work and assessed both: *Allegheny City v. Blair*, 74 Penn. St. R., 225.

See *Schenley v. Com.*, 86 Penn. St. R., 29, 60, as to the new work.

Where a party entered into a contract with the united counties of Bruce and Huron to construct a gravel road in Bruce, and the counties were subsequently separated, held that he could not sue alone the county in which the work was done, but that he must sue the united counties: *Elkins v. Bruce Co.*, 30 U. C. Q. B., 48; *Campbell v. York and Peel*, 26 U. C. Q. B. Rep., 635, 27 id., 138.

As to the proper party to bring suit in case of assets of two counties united, when no suit is brought until after dissolution of the union, see *Frontenac v. Kingston*, 20 U. C. Com. Pl., 49.

Where a county was entitled annually to ascertain and demand from a city its proportion of the jury expenses of that year, it was held that unless this was annually done the accumulated arrears of several years, during which there was an omission by the county to demand any sum, could not be recovered: *Frontenac v. Kingston*, 20 U. C. Com. Pl., 49.

The remedy seems to have been held to be by assessment upon the city and

not by suit against it: see pp. 66-70, 71-2, and cases cited.

The legislature of a state has power to enlarge the limits of a municipality and thereby bring within its area, and subjecting to municipal control against the owner's consent, farm property lying outside of the actual city limits: *Giboney v. Cape Girardeau*, 58 Mo., 141 and cases cited; *Stilz v. Indianapolis*, 55 Ind., 515, 524 and cases cited.

See, however, in *Iowa*, *Fulton v. Davenport*, 17 Iowa, 404.

In *Kentucky*, *Cheaney v. Honser*, 9 B. Monr., 830, and cases cited *arguendo*, 58 Mo., p. 141.

As to principles on which such lands are to be assessed, see *Kaiser v. Weise*, 85 Penn. St. R., 386; *Seeley v. Pittsburgh*, 83 Penn. St. R., 380.

As to when farm property may be taxed for purposes which are not *municipal*, as to aid in constructing a railroad, though exempt from taxation for *municipal* purposes, see *Sears v. Iowa*, etc., 39 Iowa, 417.

As to remedy of owner of land in town illegally assessed for betterments against a city to which the territory including his land is annexed, see *Norton v. Boston*, 119 Mass., 194.

[2 Queen's Bench Division, 569.]

June 28, 1877.

***THE QUEEN V. CHARLES BRADLAUGH and ANNIE [569
BESANT (')].**

Obscene Publication—Absence of Corrupt Motive—Indictment—Omission to set out Words charged as Obscene—Practice.

In an indictment for the publication of an obscene book, the fact that the book is described by its title only, without setting out any of the words charged as obscene, is no ground for a motion to quash the indictment or arrest the judgment.

Seem, that such omission of the words charged as obscene is not open to objection by demurrer or otherwise.

THE indictment which had been removed by certiorari into this court, contained two counts charging that the defendants "unlawfully and wickedly devising, contriving, and intending, as much as in them lay, to vitiate and corrupt the morals as well of youth as of divers other subjects of the Queen, and to incite and encourage the said subjects to indecent, obscene, unnatural, and immoral practices, and bring them to a state of wickedness, lewdness, and debauchery, unlawfully, &c., did print, publish, sell, and utter a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book, called 'Fruits of Philosophy,' thereby contaminating, vitiating, and corrupting the morals, &c."

At the trial before Cockburn, C.J., on the 18th of June, 1877, the defendants moved to quash the indictment on the ground of its insufficiency. The Chief Justice reserved the point. Evidence was then given of the publication by the

(¹) Reversed, 3 Q. B. Div., 607. See note at end of case.

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defendants, at the price of 6d., of a pamphlet called 'Fruits of Philosophy,' in which certain checks upon the increase of population were described and recommended. The jury 570] found that the book was calculated to deprave *the public morals, but they entirely exonerated the defendants from any corrupt motives in publishing it. A verdict of guilty was entered, judgment being postponed till the 25th of June.

June 25. The defendants in person moved to quash the indictment, or to arrest judgment on the ground that the indictment being for an obscene libel, the words supposed to be criminal in that libel ought to have been expressly specified in the indictment, which had not been done (*).

In Archbold's Criminal Pleading, p. 58 (18th edition), it is said, "where words are the gist of the offence, they must be set forth with particularity in the indictment." In *Dr. Sacheverell's Case* (*) the judges, in answer to a question from the Lord Chancellor, gave their opinion that by the laws of England and constant practice in all prosecutions by indictment or information for crimes or misdemeanors, in writing or speaking, the particular words supposed to be criminal, ought to be specified in such indictment or information. In *Rex v. Christopher Layer* (†) a different opinion was expressed; but in *Rex v. Goldstein* (‡) it was again laid down that the words in the libel must be set out. *Zenobio v. Axtell* (§) is to the same effect. In Russell on Crimes, 5th ed., vol. iii, p. 219, it is said: "The libellous matter must be set out in the indictment, and the libel proved must appear to correspond with the statement of it in the indictment." Archbold, on Criminal Pleading, pp. 806, 808, states the law to the same effect. In Broom and Hadley's Commentaries, vol. iv, p. 408, it is explained that the indictment must have precise and sufficient certainty in order that the defendant may know what it is that he is called upon to answer. The defendants did not know when this prosecution commenced whether they had to answer for the whole book or for the language of a part.

[COCKBURN, C. J.: Suppose the prosecution had set out the whole of the book, you would still have been in the same difficulty. It is described as a book, and you must assume that that means the whole of the book].

571] *Even then the book as a whole, or the parts specified, ought to be set out in the indictment at length. It

(*) They also moved for a new trial upon various grounds. It is unnecessary to refer to this part of the motion.

(†) 15 How. St. Tr., at p. 466.

(‡) 16 How. St. Tr., 93, at p. 317.

(§) 3 B. & B., 201.

(§) 6 T. R., 162.

is not enough to merely set out the title of the book. In *Rex v. Curl* ⁽¹⁾, one of the first cases on this bench of the law, the libellous passages were set out at length on the record.

Sir H. Giffard, S.G., and *Mead* (*Straight* with them), showed cause: In *Dr. Sacheverell's Case* ⁽²⁾, the House of Lords decided against the opinions of the judges.

[COCKBURN, C.J.: Ought not the libel to be set out to enable the defendant to demur?]

The same reasoning must apply, whether the libel is in the form of a printed book or a picture, and a picture could not be copied in the indictment. The book as a whole is indicted, and it cannot be set out regardless of its length. The precise question has come before the American courts. In *The Commonwealth v. Holmes* ⁽³⁾, where the defendant was indicted for an obscene libel, described as the "Memoirs of a Woman of Pleasure," it was contended that the obscene matter ought to have been set out in the indictment, but Parker, C.J., said that it never could be required that the obscene book or picture should be displayed upon the records of the court. This would be to require that the public itself should give permanency and notoriety to indecency in order to punish it. In *The Commonwealth v. Sharpless* ⁽⁴⁾ the indictment was for exhibiting an indecent picture, and the objection was taken by the defendant that it ought to be set out distinctly, so that he might prepare his defence, and that the court might know precisely the charge it had to try. Tilghman, C.J., said, "Must the indictment describe minutely the attitude and posture of the figures?—I am of opinion that the description is sufficient." *Reg. v. Dugdale* ⁽⁵⁾ is the only English case that bears in any way on this particular point of law. In that case the defendant was indicted for having obscene works in his possession for the purpose of selling them, and for procuring them for a like purpose, but though the libels had not been set out on the indictment, the objection raised in this case was not urged by counsel. Secondly, *it is too late to raise [572 the objection, for the defendants are in the same position now as they were before the trial, and it would have been too late to have raised the objection then. It should have been raised by demurrer. Issue had been joined, and the court will not quash an indictment for an objection which might be taken by demurrer.

⁽¹⁾ 17 How. St. Tr., 154.

⁽²⁾ 15 How. St. Tr., at p. 466.

⁽³⁾ 17 Mass. Rep., 335, at p. 336.

⁽⁴⁾ 2 Serg. & Rowl., 91, at p. 103.

⁽⁵⁾ Dearsley & Pearce, C. C., 64.

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[COCKBURN, C.J.: It may be taken on a motion in arrest of judgment.]

The jury have found that the book is obscene, and it is too late to move in arrest of judgment.

COCKBURN, C.J. (After stating that the application for a new trial must be refused, proceeded): It is said that even if there can be no new trial, on the ground that the verdict of the jury was conclusive on the facts, nevertheless the indictment cannot be sustained, and that we ought now to arrest the judgment by reason of the legal insufficiency of the indictment. This contention is founded upon the proposition that in an indictment for an ordinary libel, where the libellous matter consists of words, the words must be set out so that the defendant may know what it is that he is called upon to answer, and that if he chooses to take the legal objections, which he may do on demurrer, to the sufficiency of the indictment, he may have the opportunity of doing so. We agree with that proposition. It is said, on the other hand, that it would be highly inconvenient that obscene matters should be set out upon the records of the court, and that the same argument and the same rule would apply to the case of an indecent print which applies to the case of indecent words, and that it would be impossible, or at all events in the highest degree objectionable, to have an indecent print exhibited upon an indictment which would afterwards form part of the records of this court. We have had pressed upon us two decisions of the American courts. These decisions are not so conclusive upon us as if they were decisions of courts having equal jurisdiction in this country, but we look upon the decisions of the American courts with very great respect, and take advantage of them in the solutions of questions of law. Even putting these decisions on one side, the question of convenience presses upon us strongly. I agree that where particular passages 573] *in a work, as contradistinguished from the work itself, are made the subject-matter of an indictment, it would be highly expedient that the attention of those against whom the publication of such matters is made the subject-matter of prosecution, should be drawn to such passages, that they may have the opportunity of knowing what it is against which they are to direct their defence. On the other hand if not particular portions of a work, but the work itself in its entirety and as a whole is made the subject-matter of a prosecution, one cannot but see that it would lead to the greatest inconvenience to have the whole of the work set out from beginning to end. We were told the other day

that a prosecution had recently been instituted, or was about to be instituted, in respect of the publication of the "Memoirs of the Comte de Grammont," on the ground that it was an indecent and obscene publication, because it describes with a great deal of particularity the licentious habits of the court of Charles II. While I do not express any opinion with reference to a prosecution founded upon the publication of a work which has existed for so many years, and has gone through so many editions, and been translated into several languages, I merely mention this as an instance of what would be the monstrous inconvenience of setting out in extenso the whole of a publication which may consist of two or three volumes. Many other works might be mentioned, which are more or less of an indecent and indelicate character, and more or less inconsistent with good morals, and which may therefore be made the subject-matter of an indictment, in which the objection to the work would be not that it contains particular passages which are objectionable, but that it is objectionable in toto; and in such instances to set out the whole work would lead to a degree of inconvenience which we cannot help taking into account.

I do not think it was competent for me upon this objection to quash the indictment. The Solicitor General has also said the defendants should have applied earlier if they desired to have the indictment quashed, and it appears to me that I went too far, and that I was not called upon to give leave to move upon the point. Another difficulty I feel with reference to the objection is that it ought to have been taken by demurrer. If the omission *is in the indictment— [574 if that be the objection, and it be a valid one, it is an objection that ought to have been taken by demurrer, and, therefore, I cannot help thinking that, upon the balance of convenience we shall act more wisely in saying that the judgment pronounced upon this indictment ought not to be set aside by making the motion absolute to arrest the judgment; but if there be any valid foundation for the contention the defendants have raised upon the indictment it should be taken by demurrer.

Although the subject-matter of this indictment falls within the law of libel, it to a certain extent arises out of the general law, as being *commune nocumentum*—a matter complaint as to which arises from its being subversive of public morals and therefore a public nuisance, I therefore cannot feel that the authorities which have been cited for the purpose of showing that in an indictment for libel the words must be specially set forth apply to this case. No doubt,

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there is the inconvenience to the defendant, that he may be put to the inconvenience and expense of a trial, when if the words were set forth, on demurrer, judgment might be given in his favor at once. The advantage of an early decision cannot be obtained under this form of indictment, and it may be that this is an advantage of which it is hard that the defendants should be deprived.

We shall, however, shelter ourselves under the decisions of the American courts, leaving the ultimate decision of this matter, an important one, no doubt, to the Court of Error. I do not think that there should be any rule for an arrest of judgment.

MELLOR, J. (The learned judge concurred in refusing the application for a new trial and proceeded): With regard to the other point, I cannot help thinking that there is no reason why an objection of this character could not be taken by demurrer to the indictment. The objection was not taken upon demurrer, and the jury have now interpreted and applied the general description of the book in the indictment as an obscene work. If it be essential to set forth the terms in which the libel was published, the point may still be taken upon error.

Rule refused.

Solicitor for the prosecution: *T. J. Nelson.*

This case was reversed by the Court of Appeal (3 Q. B. Div., 607), but as that is not the highest court in England, and this report of the case, in the Queen's Bench, is brief, it was thought advisable, owing to the notoriety which the case has obtained in England and in this country, to report it in the Queen's Bench.

The rule seems to be well settled that in an indictment for libel, and circulating obscene literature, the very words of the libel or obscene literature must be set forth so that it may "judicially appear that the defendant is guilty of the crime alleged against him:" 1 Starkie's Crim. Pl. (2d ed.), 125-6; Com. v. Sweney, 10 Serg. & Rawle, 173; 2 Bish. Cr. Proc. (2d ed.), §§ 789-790; 1 id., §§ 496, 561.

See Bishop's Stat. Crimes, § 550.

As to other necessary allegations in libel, see Com. v. Meesser, 1 Brewst. (Pa.), 492; State v. Atkins, 42 Verm., 252.

For statutes against importing, circulating or selling obscene literature,

etc., see U. S. Revised Statutes, §§ 2491-2, 3878-3893, 1785, 5380; Laws N. Y. 1873, chap. 777, p. 1183.

Any offense which in its nature and by its example tends to the corruption of morals, as the exhibition of an obscene picture, is indictable at common law.

In an indictment for exhibiting an obscene picture, it need not be averred that the exhibition was public; if it be stated that the picture was shown to sundry persons for money, it is a sufficient averment of its publication.

Nor is it necessary that the postures and attitudes of the figures should be minutely described; it is enough if the picture be so described as to enable the jury to apply the evidence, and to judge whether or not it is an indecent picture.

Nor is it necessary to lay the house, in which the picture is exhibited, to be a nuisance, but one tending to the corruption of morals: Com. v. Sharpless, 2 Serg. & Rawle, 91.

That which offends modesty and is indecent and lewd, and tends to the creation of lascivious desires, is obscene.

Obscenity is determined by the common sense and feelings of mankind and not by the skill of the learned, and is a question purely for the jury, in which they cannot be aided by the testimony of experts.

Obscenity does not depend on the truth or falsity of the matters published, but upon their tendency to inflame the passion and debauch society.

It is sometimes not only expedient but necessary, to the proper administration of justice, that a judge should express his opinion on the evidence, but this should always be accompanied with the instruction to the jury that the facts of the case are for their determination.

If there be a doubt as to the obscenity of the publication, it is the duty of the jury to acquit.

Books and publications necessary for medical instructions may become libels if published with mere motive of gain, or with a corrupt desire to debauch society: *Commonwealth v. Landis*, 1 *Legal Gazette Rep.*, 42, 8 *Philadelphia Rep.*, 453.

Where an act of Parliament prohibits a certain thing from being done, it is no answer on the part of the person who wilfully does the thing prohibited that he had no improper motive in doing it.

By the 20 & 21 Vict. c. 83 ("Sale of Obscene Books, etc., Prevention Act"), s. 1, it is enacted that it shall be lawful for any two justices upon information that the complainant has reason to believe, and does believe, that any obscene books are kept in any house for the purpose of sale, and that one or more articles of the like character have been sold, and upon the justices being satisfied that any of such articles are of such a character and description that the publication of them would be a misdemeanor, and proper to be prosecuted as such, to give authority by warrant to a constable to enter into such house, and to search for and seize all such books, and to carry them before such justices, who are to summon the occupier of the house to show cause why the articles seized should not be

destroyed; and upon the hearing, power is given to the justices to order such articles to be destroyed accordingly. The appellant was proceeded against under the act for having in his possession a number of copies of a book called "The Confessional Unmasked," and the justices, upon hearing, ordered that the copies seized should be destroyed. Upon appeal against this order to the quarter sessions the recorder quashed the order, subject to a case for the opinion of the Queen's Bench, which stated, "About one half of the pamphlet relates to casuistical and controversial questions which are not obscene, but the greater half of the pamphlet is obscene in fact, as containing passages which relate to impure and filthy acts, words, and ideas. The appellant did not keep or sell the said pamphlet for the sake of gain, nor to prejudice good morals, though the indiscriminate sale and circulation of them is calculated to have that effect; but he kept and sold the pamphlet as a member of the 'Protestant Electoral Union,' to promote the objects of that society, and to expose what he deems to be errors of the Church of Rome, and particularly the immorality of the confessional. I was of opinion that, under the circumstances, the sale and distribution of the pamphlets would not be a misdemeanor; nor be proper to be prosecuted as such, and, accordingly, that the possession of them by the appellant was not unlawful within the meaning of the statute. I therefore quash the order made by the said justices, and directed the pamphlets seized to be returned to the appellant".

Held, that the recorder was wrong, for that the sale of an obscene book—one calculated to corrupt the minds and morals of those into whose hands it may come—is an indictable misdemeanor, even though a good ulterior object was intended to be served by such sale: *Reg. v. Hicklin*, 11 *Cox's Crim. Cas.*, 19.

Certain counts in an indictment charged the defendant with preserving and keeping in his possession obscene prints with the intent and for the purpose of unlawfully uttering and selling the same, and thereby corrupting the morals of the liege subjects of

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the Queen: Held, upon writ of error, insufficient in law.

But held, that the counts in the indictment charging that the defendant did unlawfully obtain and procure obscene prints with a like intent, and for a similar purpose, were good, and charged a misdemeanor punishable at common law: *Dugdale v. Queen, Dearsley's C. C. Res.*, 64.

An indictment under the Revised Statutes, chap. 180, sec. 10, for selling a book containing obscene language, etc., must either contain an express allegation that the defendant knew that the book contained obscene language, or something equivalent to it: *Com. v. McGarrigill*, 13 Law Reporter, N.S., 101, Municipal Court, Boston.

The utterance of obscene words in public, being a gross violation of public decency and good morals, is indictable.

In a prosecution for the utterance of obscene language in public, it is not necessary that the words should be proven exactly as charged to have been spoken. *Bell v. State*, 1 Am. L. Reg. (O.S.), 367.

1. The power vested in Congress to establish "post-offices and post-roads" embraces the regulation of the entire postal system of the country. Under it, Congress may designate what shall be carried in the mail, and what excluded.

2. In the enforcement of regulations excluding matter from the mail, a distinction is to be made between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage, and what is open to inspection, such as newspapers, magazines, pamphlets and other printed matter, purposely left in a condition to be examined.

3. Letters, and sealed packages subject to letter postage, in the mail, can be opened and examined only under like warrant issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and

seizures extends to their papers, thus closed against inspection, wherever they may be.

4. Regulations against transporting in the mail printed matter, which is open to examination, cannot be enforced so as to interfere in any manner with the freedom of the press. Liberty of circulating is essential to that freedom. When, therefore, printed matter is excluded from the mail, its transportation in any other way as merchandise cannot be forbidden by Congress.

5. Regulations excluding matter from the mail may be enforced through the courts, upon competent evidence of their violation obtained in other ways than by the unlawful inspection of letters and sealed packages; and with respect to objectionable printed matter, open to examination, they may in some cases also be enforced by the direct action of the officers of the postal service upon their own inspection, as where the object is exposed, and shows unmistakably that it is prohibited, as in the case of an obscene picture or print: *Ex parte Jackson*, 93 U. S. Rep., 727.

Statutes creating crimes will not be extended by judicial interpretation to cases not plainly within their terms.

Congress has no power to make criminal the using of means to procure abortions in the several states. That power belongs to the respective states. But Congress has plenary power over the mails and the postal service, and may declare what shall and what shall not be mailable matter, and punish violations of its criminal enactments in this regard.

The indictment charges that the defendant knowingly deposited in the mail a letter giving information where, how, and of whom the inhibited articles could be obtained. This was in answer to a fictitious letter of inquiry. The letter written and mailed by the defendant was addressed to a person who had no existence. On its face it did not show that it was within the prohibition of the statute. If it had been suffered to go through the mail to the place to which it was addressed it would not have been called for, but have been sent to the dead letter office,

and could not have given any person within the meaning of the statute: the prohibited information. Held that U. S. v. Whittier, 10 Chic. Leg. News, this was not the giving of information 229.

[2 Queen's Bench Division, 575.]

June 6, 1877.

[IN THE COURT OF APPEAL.]

*OASTLER and Others v. HENDERSON. [575]

Practice—Application for New Trial on ground of Surprise—Surrender of Term by operation of Law—Landlord and Tenant—Rules of Court, December, 1876, Order XXXIX, Rule 1.

After a trial by a judge without a jury any application for a new trial must be made to the Court of Appeal under Order XXXIX, Rule 1, whatever the ground of it may be.

Plaintiffs let a house to defendant for seven years from Lady Day, 1868. Defendant entered and occupied till Michaelmas, when he left England for America. He left the keys with an agent to dispose of the house if he could, if not, to make the best bargain he could with plaintiffs for the surrender of the term. The agent was unable to find a tenant, and gave the keys in December, 1868, to plaintiffs. They employed a house agent to let the house, and he put up bills in the house and advertised it to let, but the house was not let till Lady Day, 1872, when a new tenant went in. In 1870, for a short time, some workmen of plaintiffs occupied two rooms in the house for the purpose of plaintiffs' saddlery business. Plaintiffs having sued defendant for rent from Michaelmas, 1868, to Lady Day, 1872:

Held, that there had been no possession of the house by plaintiffs so inconsistent with the continuance of defendant's term as to estop plaintiffs from alleging the continuance of it, so as to effect a surrender of the term by operation of law.

ACTION to recover £490, being the amount of three and a half years' rent of a house from Michaelmas, 1868, to Lady Day, 1872.

Defence, that the lease under which the rent was claimed had been surrendered by operation of law before any of such rent had become due.

At the trial before Lush, J., without a jury, at the Middlesex Easter Sittings, 1877, it appeared that the plaintiffs, who are a firm of saddlers, had granted to the defendant a lease of a house in Coventry Street, the property of the firm, for a term of seven years from Lady Day, 1868, at a yearly rent of £140. The defendant entered under the lease, and occupied the premises for the purposes of his business until the autumn of 1868, when, finding his business unprofitable, he left England for America. Before leaving he gave the keys of the house to one Addison, as his agent, to dispose of the premises, if possible, or to make the best bargain he could with the plaintiffs for the surrender of the term. Addison *being unable to find a tenant, gave the keys [576 to a servant of the plaintiffs in December, 1868. Shortly

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afterwards, in the beginning of 1869, bills appeared in the windows of the house, advertising that it was to be let, and giving a reference to a Mr. Bonham, a house agent.

The house was not actually let until March, 1872, when the new tenant entered upon occupation. In the interval, during a part of the year 1870, some of the plaintiffs' workmen had occupied two of the rooms of the house for the purpose of the saddlery business.

One of the plaintiffs swore that his firm had not put the premises into Bonham's hands until March, 1872, just before they were actually let, and that Bonham's putting up of the bills and attempting to let the house in 1869 was wholly unauthorized by the plaintiffs.

The judge entered the verdict and judgment for the plaintiffs.

Shortly after the trial the defendant discovered that the plaintiffs had authorized Bonham to try and let the premises in 1869; that they had given him the keys for that purpose, and had been charged by him with the costs of the bills and advertisements. It was also discovered that Bonham, with the plaintiffs' authority, frequently showed applicants over the house during that year, and that he only returned the keys to the plaintiffs for a short time in 1870, when they wanted the use of the two rooms for their workmen.

On affidavits of these facts the defendant moved the Queen's Bench Division for a new trial on the ground of surprise. The court granted an order *nisi*, which they afterwards discharged, on the ground that they had no jurisdiction, the trial having taken place before a judge without a jury, and that in such a case the application for a new trial ought to have been made to the Court of Appeal under Order xxxix, Rule 1, December, 1876.

From this decision the defendant appealed, at the same time applying to the Court of Appeal by way of original motion.

Grantham, Q.C., for the defendant: The court below were wrong in declining jurisdiction, for the application was rightly made to the Divisional Court, the application [577] being on the ground *of surprise, not on the ground of anything done by the judge sitting as judge or jury, and it is only in the latter cases that it was intended by Order xxxix, Rule 1, December, 1876, that the application for a new trial should be made to the Court of Appeal.

[THE COURT intimated that in their opinion the court below were right in refusing jurisdiction.]

The defendant was entitled to judgment. There was a

surrender of the term by operation of law when the keys were handed to the plaintiffs in December, 1868. The re-letting in March, 1872, clearly amounted to a surrender, and such surrender related back to the date of the giving up of the keys: *Phenè v. Popplewell* (').

[BRETT, L.J.: That case is distinguishable, for there was an actual entry into possession in the first instance.]

Talfourd Salter, Q.C., and *Edward Clarke*, for the plaintiffs, were not called upon.

COCKBURN, C.J.: I am of opinion that there ought not to be a new trial. I believe that the defendant's affidavits show correctly what the real state of facts was; but even assuming that to be so, I still do not think that they disclose any evidence of a surrender of the defendant's lease by operation of law. The facts are these: The defendant takes a lease for seven years and enters into possession, but shortly afterwards quits the premises and goes to America with apparently no intention of returning. Before going away he gives the keys to an agent, with instructions to let the premises, if he can, and if not, to try to induce the plaintiffs to accept a surrender. The agent, not succeeding in letting the premises, hands over the keys to the plaintiffs, who at once endeavor themselves to let them, but without success, until March, 1872. The plaintiffs then, by letting the premises to a new tenant, put an end to the defendant's term from that date, for they thereby did an act so inconsistent with the continuance of the defendant's term, that they were estopped from denying that it was at an end. But up to that date they had not done such an act, for they had not virtually taken possession of the premises; and in order to estop the lessors, so as to constitute a surrender by operation of law, there must be a taking of possession. [578] I do not say a physical taking of possession, but, at all events, something amounting to a virtual taking of possession. But here there was no such taking of possession. The plaintiffs, the landlords, took the keys because they could not help themselves, the defendant being gone, and, for all they knew, not likely to return. Then they try to let the house, but what else, under the circumstances, were they to do? They must do the best they could. If they had let the house, they would have done so as much for the benefit of the defendant as of themselves. The mere attempting to let does not amount to an estoppel. The land-

(') 12 C. B. (N.S.), 384; 31 L. J. (C.P.), 235.

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lords did nothing but what they might reasonably be expected to do under the circumstances for the benefit of all parties. As for the fact that the plaintiffs' workmen used two of the rooms in 1870, I do not think that any jury ought to hold that to be equivalent to a taking of possession, for it is, under the circumstances, quite consistent with an intention to hold the defendant to his lease.

BRAMWELL, L.J.: I am of the same opinion. I think it ought to be assumed, in favor of the defendant, that the new matters adduced are true. But even then I think that there is no evidence for a jury of a surrender until 1872. The keys find their way into the hands of the plaintiffs, who no doubt received, along with the keys, an intimation that the defendant wanted to get rid of his lease. Looking at all the facts of the case together, including the fact that the defendant had left the country, what would a reasonable man do under the circumstances? Why, exactly what the plaintiffs did, endeavor to let the house. That they are unable to do until 1872, and in the interval they use two of the rooms. But as the house was unoccupied and bringing in no rent, and as they probably thought that the defendant was not going to return, surely that was a very natural thing for them to do. Mr. Grantham has contended that the surrender by the ultimate letting in 1872, relates back to the receipt of the keys, and carries back with it the intention to take possession to that earlier date; and the case 579] of *Phenè v. Popplewell* (¹), which he has cited, *at first sight gives considerable countenance to his contention. But all that that case goes to show is, that in that particular case, the equivocal act of using the keys for the purpose of obtaining an entrance to the premises was afterwards rendered unequivocal, and the plaintiff's intention in so using them explained by his subsequent conduct; it does not show that the subsequent letting affected the legal character of the earlier act. And though the court in that case were able to conclude from the lessor's after conduct that his intention in using the keys was to take possession at once, we have no materials in the present case to enable us to arrive at a similar conclusion. I am, therefore, of opinion, that a judge, if trying this case without a jury, ought, even upon the additional matters in the defendant's affidavits, to find for the plaintiffs, or, with a jury, ought to tell them that there is no evidence of a surrender, and direct a verdict accordingly.

(¹) 12 C. B. (N.S.), 334; 31 L. J. (C.P.), 235.

BRETT, L.J.: This is an application for a new trial of a cause which was tried by a judge without a jury. Two points were argued: first, that the Divisional Court were wrong in refusing jurisdiction, for that the Rules of December, 1876, did not apply to an application for a new trial on the ground of surprise. I am, however, on that point of opinion that the court below were right, and that in cases of trials by a judge without a jury, all applications for a new trial must be made to the Court of Appeal whatever the ground of the application may be. The second point was that the facts of the case, including the new matters in the defendant's affidavit, which we must for the purposes of argument assume to be true, show a surrender of the defendant's term by operation of law in December, 1868, that is to say, that the lessors were, from that date, estopped from setting up the continuance of the particular estate. I am, however, of opinion, that that is not the case. There can be no estoppel by mere verbal agreement; there must be in addition to such agreement some act done which is inconsistent with the continuance of the lease. If after the agreement the landlord actually takes possession or does what virtually amounts to it, if he not only attempts to let, but actually does let, then there is a palpable act done with regard to the premises raising an estoppel within the rule laid down in *Nickells v. *Atherstone*(¹), following [*580 Lyon v. Reed*(²)]. It seems to me that there was no act done amounting to an estoppel prior to March, 1872. The plaintiffs' workmen were, it is true, let into two of the rooms for a time, but that was not by way of taking possession. There was afterwards, in 1872, an actual letting amounting to an estoppel, and so effecting a surrender by operation of law at that date.

Then Mr. Grantham has argued on the authority of *Phenè v. Popplewell*(³), that when once actual possession has been taken, the surrender must, as a matter of law, relate back to the date of the receipt of the keys. It that was the ground of the decision in that case I think that sitting in the Court of Appeal we ought to overrule it. But I do not think that that was the ground. The court there drew an inference of fact from the subsequent conduct of the lessor that his intention in using the keys was to take possession at once. And that being so, there is a clear distinction between that case and the present, for there there was, upon the finding of the court, a taking of possession

(¹) 10 Q. B., 944; 16 L. J. (Q.B.), 871.

(²) 13 M. & W., 285.

(³) 12 C. B. (N.S.), 334; 31 L. J. (C.P.), 235.

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in the first instance, to which we have nothing corresponding here.

Appeal dismissed, and order for new trial refused.

Solicitor for plaintiffs: *Pearpoint.*

Solicitors for defendant: *Rooks & Co.*

A surrender of demised premises by a tenant, and their acceptance by the landlord, will, without any written agreement, terminate the tenancy: *Hannam v. Sheerman*, 114 Mass., 19; *Talbot v. Whipple*, 14 Allen, 180; *Bradford v. Hopkins*, 16 U. C. Com. Pl., 298; *Allen v. Jaquish*, 21 Wend., 628.

An agreement by landlord and tenant that the term shall be put an end to, acted upon by the tenant's quitting the premises, and the landlord by some unequivocal act taking possession, amounts to a surrender by operation of law.

Where, therefore, the tenant left the key at the counting house of the landlord, and the latter, though he at first refused to accept it, afterwards put up a board to let the premises, and used the key to show them, and painted out the tenant's name from the front: *Held*, sufficient evidence of a surrender by operation of law: *Phenè v. Popplewell*, 12 Common Bench Rep., N.S., 334, 104 Eng. C. L. Rep.

In order to effect a surrender by act or operation of law, there must be a mutual agreement between the lessor and the original lessee that the lease shall terminate.

It is not necessary that this agreement should be express. It may be inferred from the conduct of the parties.

The occupancy by some person other than the lessee is a circumstance showing a surrender; but as the new occupant may enter as the tenant of the lessee, or as his assignee, or even as a trespasser, and thus his occupancy be consistent with the continuance of the first lease, it is absolutely essential that it should be clearly proved that the original lessee assented to the termination of his term.

It must be proved that the lessor and lessee mutually agreed to a surrender of the term, and that proved, the original tenant is no longer liable; but the new tenant (if there be one) is liable: *Bedford v. Terhune* 30 N. Y., 454,

affirming 1 Daly, 371; *Smith v. Niver*, 2 Barb., 180; *Harrower v. Heath*, 19 Barb., 331; *Smith v. Devlin*, 23 N. Y., 363.

Defendant being lessee in possession of premises, plaintiff, his landlord, with his consent, let them to a new tenant, and put him in possession, and discharged defendant from his liability as tenant. In an action against defendant for rent subsequently accruing, held that these facts constituted a surrender by operation of law: *Nickells v. Atherstone*, 10 Queen's Bench, 944, 5 N. Y. Leg. Obs., 457.

Where it is mutually agreed between parties that a lease shall be surrendered, and a new one is thereupon made with another party, and the landlord accepts the new party as his tenant, this will estop the landlord from afterwards denying the surrender of the first lease, notwithstanding it was in writing and under seal, and the agreement to surrender was verbal.

An actual and continued change of possession, by mutual consent of the parties, will amount to a surrender of a written lease, by operation of law.

Where certain parties procured a written lease of certain rooms, as trustees of a Good Templar's lodge, and they were occupied by the lodge of whom the lessees were trustees and two other lodges, and the last two afterwards ceased to use the rooms, whereupon the lessees notified the lessor that the lodge they represented would be compelled to vacate the premises, and the lessor then offered to reduce the rent, and the lodge accepted the rooms at the reduced rent, which it continued to pay for some time; held, that it was evidence of the surrender of the original lease to the trustees, and of a new leasing to the lodge.

Where a lodge, on terminating its lease of rooms, left property therein greatly exceeding in value the rent due, and offered the same to the lessor in payment, and he took time to con-

sider whether he would accept the same, and retained the same, giving no notice that he would not accept it in payment for some considerable time, so that the lodge might have made some other disposition of the property: Held, that his silence implied assent, and justified the jury in finding a payment of the rent.

If the lessee of rooms, before the expiration of the term, abandons the premises, and delivers the key to the lessor's agent, and notifies the lessor of the fact by letter, and he in reply to the letter makes no objection, but retains the key, this will be sufficient evidence to authorize a jury in finding a termination of the tenancy: *Dills v. Stobie et al.*, 81 Ill., 202.

The surrender of a term must, under the statute of frauds, be in writing, signed by the *party surrendering*, or it must be by act and operation of law.

The giving up and cancelling the lease by the tenant, though not *of itself* a surrender of the term, is yet a circumstance, and a strong one to be considered in connection with what was done further:

Held *per Cur.*, that the subsequent conduct of the tenant in this case (as mentioned in the judgment of the court) must be taken to be, on the principle of estoppel, an implied surrender of his lease: *Doe dem. Burr v. Denison*, 8 U. C. Q. B., 185.

To an avowry for distress for rent the plaintiff pleaded that before the distress he surrendered his interest in the term to defendant, and the said tenancy was put an end to and ceased by the defendant entering on the said premises, by act and operation of law. A lease for five years was proved at \$150 a year under which the plaintiff entered, and it appears that before the end of the second year, and before the distress, defendant, having offered the plaintiff \$50 to allow him to take possession, went to live in the house. Defendant afterwards told a witness that he had let the place again to the plaintiff on shares, he, defendant, living on it as owner. He afterwards got the lease from this same witness, with whom it had been deposited by both parties, saying that it was of no use. The plaintiff also lived in the house, but the agreement was that defendant

and not he, should have the right of possession. These arrangements were verbal. Held, that the facts proved clearly showed a surrender by operation of law, and the plea, though artificially framed, was in substance an averment that the term was thus surrendered before the distress; and that the plaintiff was entitled to recover: *Coffin v. Danard*, 24 U. C. Q. B., 267.

Where a tenant, before the expiration of his term, informs his landlord that the premises are not fit to live in, and that he will surrender them and have nothing further to do with them, and pays up the rent to that time, and the landlord informs him that he will let the premises on his (the tenant's) account, and hold him responsible for the rent, it is no evidence of a surrender, although the landlord afterwards lets the premises to a new tenant, who pays rent to him: *Bloomer v. Merrill*, 29 How. Pr., 259; *Morgan v. Smith*, 70 N. Y., 537; *Coe v. Cassidy*, 72 N. Y., 184.

An agreement for a new lease will not affect the surrender of an existing lease by operation of law, unless a *valid new lease* is made—one valid in law to pass an interest according to the contract and intention of the parties. A verbal agreement, therefore, for a term longer than one year, will not operate as a surrender of an existing lease under seal: *Coe v. Hobbey*, 72 N. Y., 141.

See *Clark v. Brown*, 19 Alb. Law Jour., 258, N. Y. Court Appeals.

It seems an agent employed to let premises and collect the rents has no authority to consent to the substitution of a new tenant, and the discharge of the original lessee; that not being within the ordinary scope of such an agent's authority. Where a lease is under seal, a parol agreement to terminate the lease and accept another person as tenant, without an actual surrender, is not sufficient to terminate the first lease, where the unexpired term is more than a year.

Nor will the mere receipt of rent from the assignee of the lease have that effect where there is no proof of the surrender of the premises, and an acceptance of the assignee as tenant: *Wilson v. Lester*, 64 Barb., 431, dis-

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tinguishing *Smith v. Niver*, 2 Barb., 180, *Harrower v. Heath*, 19 Barb., 831, and *Smith v. Devlin*, 23 N. Y., 363.

An agreement in writing, whereby A. agreed to rent a store and premises to B. for the term of three years from date for the sum of £50 per annum, with taxes; rent to be paid quarterly during occupation; B. to expend £25 in improvements; signed by both parties and dated, is a lease, and not a mere agreement for a lease. Held also, that such lease was not surrendered by operation of law, by A. afterwards agreeing, by agreement in writing, to sell the premises to B. upon certain terms and conditions to be afterwards completed; none of which were done by B. at the time appointed by the agreement, nor was he ready to do so: *Grant v. Lynch*, 6 U. C. C. P., 178.

Plaintiff leased certain premises from defendant for a term of years, but having got into difficulties said to defendant, "I can do nothing here, and I am going to give the place up, as soon as I get rid of the few things I have; I am going to leave as soon as a relation of mine comes." He then asked, "To whom shall I give the key?" Defendant replied, "To Partons." Plaintiff assented, and both then proceeded to fasten the windows. Defendant expressed his desire that plaintiff should remain, and offered to assist him, but plaintiff left and did not afterwards return.

Defendant, after plaintiff left, placed P. in charge; but plaintiff had previously given P. the key, and had instructed him *not to deliver it to defendant without an order from him*. Defendant did, however, subsequently get the key and placed a man in possession of the place. Held, that what took place constituted neither a surrender in law, nor an executed contract by which the relation of landlord and tenant was put an end to.

Held, also, that neither the giving up of the key nor the abandoning possession would of itself have been a surrender in law; but, *semble*, that the taking possession by defendant and cultivating the farm as his own absolute property would have amounted to a complete surrender in law, or would have been evidence of it, just as would the sale of the premises by defendant, or his grant of a lease thereof to a third person: *Carpenter v. Hall*, 16 U. C. C. P., 90.

As to the effect, in *New York*, of a surrender of a lease in order to be renewed, and the effect of such renewal, see 1 R. S., 744, § 2, 1 Edm. St., 695.

As to the effect in that state of a surrender of a lease for more than one year, see 2 R. S., 134, § 6, 2 Edm. St., 139.

See also *Smith v. Devlin*, 23 N. Y., 363, affirming 6 Bosw., 1; *Rowan v. Lytle*, 11 Wend., 516; *Jackson v. Gardner*, 8 Johns., 394.

[2 Queen's Bench Division, 611.]

Jan. 31, 1877.

611] *COLE, Appellant; MANNING, Respondent.

Bastardy—Corroboration of Mother—"Material Particular"—Evidence of Acts of Familiarity before the Time when the Child could have been begotten—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4.

Upon the hearing of a complaint in bastardy, the statement of the mother as to the paternity of the child may be sufficiently corroborated by the evidence of acts of familiarity between her and the defendant, although these acts have taken place at a time before the child could have been begotten; for evidence of this kind is a corroboration of the mother "in some material particular" within the meaning of the Bastardy Laws Amendment Act, 1872, s. 4.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

A complaint was preferred by the appellant against the respondent under the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3 (¹), charging that the respondent was the *father of a bastard child of the appellant, [612 born within the twelve months next preceding the date of the complaint.

At the hearing it was proved that the appellant had been delivered of a bastard child on the 10th of October, 1875, and the appellant swore that the respondent was the father, the connection having taken place at the respondent's house, where he had taken her on an evening in January, 1875. Of that meeting and that intercourse there was no corroborative evidence, nor was the magistrate satisfied with such evidence as was adduced as to subsequent conversations between the friends of the appellant and the respondent. But it was proved to the magistrate's entire satisfaction that during the summer of 1874, several months before the child could have been begotten, the parents of the appellant, with whom previously to that date the respondent had been on terms of great friendship and intimacy, refused him the house, and quarrelled with him, owing to their suspicions with regard to his conduct towards the appellant; they deposed that they surprised the appellant and respondent together on more than one occasion; that the door of the parlor where they were was closed for a minute or two against them; that the appellant sat on the knee of the respondent; and they deposed to other circumstances which would have had great effect on the magistrate's judgment had they occurred at or about the time when the child might have been begotten. The appellant was rather of weak in-

(¹) By the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3, "any single woman . . . who may be delivered of a bastard child after the passing of this act may . . . at any time within twelve months from the birth of such child . . . make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child . . . and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough,

or other place in which such justice usually acts."

Sect. 4. "After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode, six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child."

tellect, but there was no evidence of any similar misconduct on her part with other men than the respondent.

After taking time to consider, the magistrate was of opinion that he was not at liberty so to interpret the words of the statute, "if the evidence of the mother be corroborated in some material particular" (35 & 36 Vict. c. 65, s. 4), as to include evidence of facts long antecedent, and having no direct relation to the actual begetting of the child, however strong might be the moral conviction that such facts might [613] convey to his mind, but that the *word "material" must be taken to imply a closer connection of the "particular" in question than was in this case apparent with occurrences at or about the time when the child must have been begotten, or with subsequent words or actions of the respondent tending to fix the paternity.

The complaint was therefore dismissed.

Spearman (*Safford* with him) for the appellant: The question, whether a complainant in bastardy has been corroborated, is one of fact, and is to be decided by the magistrate in his discretion, *Reg. v. Percy* (¹); *Lawrence v. Ingmire* (²); and it was held, under the repealed enactments of 7 & 8 Vict. c. 101, ss. 2 and 3, that the mother need not be corroborated as to the payment of money by the alleged father, where the summons was not taken out until after twelve months from the child's birth, *Hodges v. Bennett* (³); although proof of payment was essential to the jurisdiction of the justices.

J. Thompson was called upon to argue for the respondent: In order that the mother may be corroborated "in some material particular," as required by the Bastardy Laws Amendment Act, 1872, s. 4, she must adduce evidence directly confirming her statement as to the act of sexual intercourse which has led to the birth of the child: it would be dangerous to allow acts of familiarity unconnected with that intercourse to be admitted as the corroboration rendered necessary by the statute.

MELLOR, J.: I think that the magistrate was mistaken in his decision: he ought to have received the evidence as a sufficient corroboration in point of law, and to have considered what weight was due to it in point of fact; and he in effect states that he would have found for the complainant if he had believed himself at liberty to admit it. No rule of law excludes testimony as to acts of familiarity before the time when the bastard child could have been begot-

(¹) 17 Q. B., 902, n.

(²) 20 L. T. (N.S.), 391.

(³) 5 H. & N., 625; 29 L. J. (M.C.), 224.

ten ; and evidence of that kind shows at least a probability that the statement of the mother is true. Although the corroborative evidence related to the summer of 1874, and the intercourse resulting in the birth of the child did not take place until January, 1875, yet the magistrate [614 was bound to act upon that evidence if he was satisfied as to its truth.

FIELD, J.: I am of opinion that the case must be remitted to the magistrate to be heard and determined by him. He was quite at liberty to entertain the evidence as to what took place between the appellant and the respondent in the summer of 1874. The object of the bastardy laws was to give a woman the right to have her illegitimate child maintained by the father thereof: but, in order to prevent the danger which would arise if the statement of the mother were admitted without confirmation, the Legislature has rendered it necessary that her evidence shall be corroborated "in some material particular;" and this is, no doubt, a proper precaution, as the sexual intercourse almost invariably takes place without the knowledge of other persons. It cannot be doubted that the testimony of the appellant's parents would have been material if it had related to events occurring at a later time, that is to say, in the month of January, 1875. The appellant is of weak intellect, and therefore less able to take care of herself: her parents found that the respondent would very likely take advantage of her, and they forbade him their house. The magistrate says that the acts of familiarity deposed to by the appellant's parents would have had a great effect upon his judgment, if he had considered himself at liberty to take them into consideration as corroborative evidence. I know of no rule of law which prevented him from so doing. Suppose that in the summer of 1874 the appellant and the respondent had been seen walking together in a lonely spot, such as might be convenient for the commission of immoral acts: certainly that would be a material corroboration of the appellant's evidence as to the paternity of her illegitimate child; and I do not think that the testimony rejected by the magistrate is distinguishable in principle. I am clearly of opinion that the evidence given by the appellant's parents did corroborate her statement in a material particular.

Case remitted.

Solicitors for appellant: *Cordwell & Tasman.*

Solicitors for respondent: *Hicklin & Washington.*

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On hearing of a libel for divorce on the ground of adultery committed with a certain person, evidence of acts of adultery by the libellee with that person out of the commonwealth and after the filing of the libel, is competent to show the nature of the intercourse between them at the time when the adultery is alleged in the libel to have been

committed: *Thayer v. Thayer*, 101 Mass., 111.

"Upon the trial of an indictment for adultery, evidence of other acts of adultery committed by the same parties, near the time charged, though in another county, is admissible to support the indictment:" *Commonwealth v. Nichols*, 114 Mass., 285.

C A S E S
DETERMINED BY THE
COMMON PLEAS DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE COMMON PLEAS DIVISION,
XL VICTORIA.

[2 Common Pleas Division, 265.]

Feb. 7; May 7, 1877.

[IN THE COURT OF APPEAL.]

*BESSELA V. STERN.

[265]

*Breach of Promise of Marriage—Material Evidence in support of Promise—32 & 33
Vict. c. 68, s. 2.*

In an action for breach of promise of marriage, the plaintiff having sworn that the defendant had seduced her and had repeatedly promised to marry her, her sister gave evidence that, at an interview she had with the defendant when she discovered her sister's condition, she upbraided him for the ruin and disgrace he had brought upon the plaintiff, when he said "he would marry her and give her anything, but I must not expose him." The sister further stated that, after the plaintiff's confinement, she overheard a conversation between the plaintiff and the defendant in the course of which the plaintiff said to the defendant, "You always promised to marry me, and you don't keep your word," when the defendant said he would give her some money to go away.

Held, reversing the judgment of the Common Pleas Division, that this was "material evidence in support of the promise," to satisfy the requirement of 32 & 33 Vict. c. 68, s. 2.

ACTION for breach of a promise to marry.

The cause was tried before Herschell, Q.C., at the last Liverpool summer assizes. The plaintiff gave evidence that she was a native of Berlin; in 1874 she went into the service of the defendant's father who kept an hotel in Liverpool,
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and whilst there was seduced by the defendant, who made her repeated promises of marriage. In June, 1875, finding herself with child, she, at the defendant's instigation, left the house of his father, and went into lodgings in Liverpool, where she was ultimately confined, and where she was visited by the defendant both before and after that event. The defendant paid for her lodgings, provided an accoucheur for her, and gave her small sums of money from time to time, and at length persuaded her to go to Germany, for which purpose he supplied her with money to the extent of £50 or £60. After remaining about four months in Germany, the plaintiff returned to Liverpool, and, the defendant repudiating the alleged engagement to marry her, she obtained an affiliation order of 4s. per week against him. In January, 1876, she brought this action.

In order to satisfy the requirement of 32 & 33 Vict. c. 68, 266] *s. 2 (¹), Marie Bessela, the plaintiff's sister, was called. Her evidence was to this effect,—In May, 1875, I saw that the plaintiff was in the family way. I went to see the defendant. I said: "What have you done? You've got her into such disgrace. What do you mean?" He said he would marry her, and give her anything; but I must not expose him. I said: "I hope you'll do so." In July, 1875, I went to the defendant's office. He gave me £1 to give my sister. I said: "What are you intending to do?" He said: "There's plenty of time to talk of that when that thing is born." I was at Mrs. Balmer's (where the plaintiff was confined) shortly after the birth of the child. Defendant came, and went into the parlor where my sister was. I could hear what they were saying. She said: "You always promised to marry me, and you don't keep your word." He said he would give her some money to go away. He said: "Why did you not make away with the little devil?" He parted in very bad temper.

The defendant, who was called as a witness, admitted the alleged connection and the paternity of the child, but positively denied that he had ever promised to marry the plaintiff.

Upon this and other evidence which is irrelevant to the present purpose, the case was left by the learned commissioner to the jury, who found a verdict for the plaintiff with

(¹) 32 & 33 Vict. c. 68, s. 2: "The parties to any action for breach of promise of marriage shall be competent to give evidence in such action: provided always that no plaintiff in any action for breach

of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

£100 damages. The commissioner declined to enter judgment for either party.

Feb. 7. *Torr*, Q.C., and *Crompton*, moved for judgment for the plaintiff: The question is whether a promise made to a third person can be "material evidence in support of the promise" within 32 & 33 Vict. c. 68, s. 2 (¹). The conversation deposed to by the sister to have passed between the plaintiff and the defendant on the second occasion surely was some evidence. The evidence of an accomplice is not received without corroboration; but the corroborative evidence need not be such evidence as would prove the commission of the crime. So, in cases under *the bas- [267 tardy law, although the words of 7 & 8 Vict. c. 101, s. 3, are nearly the same as those of the act in question (²), it is not necessary, and indeed it would obviously be impossible, to obtain proof such as is suggested was requisite here. The materiality of the corroborative evidence must be judged by all the surrounding circumstances.

Day, Q.C., and *Gully*, for the defendant: The evidence given by the plaintiff's sister clearly was not "material evidence in support of the promise;" at the most, it amounted only to a wild assertion by a man anxious to avoid exposure,—“He said he would marry her, and give her anything; but I must not expose him.” How can that be material evidence in support of a previous promise to marry the plaintiff? It is a new promise made to a third person not in the plaintiff's presence. And as to the conversation between the plaintiff and the defendant overheard by the sister, it amounts only to an assertion by the plaintiff that the defendant had promised her marriage. The defendant's abstaining from contradicting the plaintiff's assertion was no corroborative evidence within the act. It could hardly be expected that he would deny the statement at such a time. The words imputed to him on that occasion are certainly not the words of a man under an engagement to marry the woman he had seduced. This kind of evidence ought to be carefully watched: see Taylor on Evidence, 6th ed., §§ 1175, 1176.

Torr, Q.C., was heard in reply.

GROVE, J.: I am far from saying that this case is free from difficulty. The statute casts upon the judge the duty of determining what is material corroborative evidence in support of the testimony of the plaintiff herself that the

(¹) See note (1) on preceding page.

(²) 7 & 8 Vict. c. 101, s. 3: “If the evidence of the mother be corroborated in some material particular by other testimony, to the satisfaction of the said justices,” &c.

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defendant has promised to marry her. If the words of this act had been, like those of the Bastardy Act, 7 & 8 Vict. c. 101, s. 3, "corroborated in some material particular by other testimony," then the case would have been brought within the words of the statute, because any evidence which must be left to the jury would fall within that description. But the words here are, "some other material evidence in support of such promise." There must be something more 268] than a mere scintilla *of evidence which would be admissible. Upon the best opinion I can form, I think the evidence in this case was not "material evidence in support of the promise,"—not the sort of evidence the statute requires. The evidence upon which the point really arises is that of the plaintiff's sister, which was to this effect: "In May, 1875, I saw that the plaintiff was in the family way. I went to see the defendant: I said, 'What have you done? you've got her into such disgrace. What do you mean?' He said he would marry her, and give her anything; but I must not expose him. I said, 'I hope you'll do so.'" It does not appear that the witness was aware at that time that there had been any promise of marriage. That cannot be relied on as a new promise: it is given to a third person. Neither can it be said to be a corroboration of a previous promise to marry the plaintiff. She goes on,—“In July, 1875, I went to the defendant's office. He gave me £1 to give my sister. I said, 'What are you intending to do?' He said, 'There's plenty of time to talk of that when that thing is born.'" Then comes the conversation between the plaintiff and the defendant deposed to by the sister, in which the plaintiff is represented to have said to the defendant, "You always promised to marry me, and you don't keep your word," to which the defendant replied that he would give her some money to go away,—adding, "Why did not you make away with the little devil?" That seems to me to be somewhat inconsistent with the first conversation. If he had promised before, one would have expected that he would have given a different answer when thus challenged. On the one hand, the defendant's abstaining from contradicting the plaintiff's assertion might be some evidence for the jury that he had made some promise; but, on the other hand, coupling it with the unfeeling remark about the child, it would seem to negative the idea of his ever having contemplated marriage. Taking it all together, I think it does not amount to "material evidence in support of the promise" such as the statute contemplates. It is capable of either interpretation. The act must have meant

something by the word "material." There is in these cases a strong interest in the woman to prove a promise; and therefore the Legislature has thought fit to require that her evidence of the promise shall be corroborated "by some other material evidence in support of *such promise*." The *fact of the man saying nothing when taxed by the [269 plaintiff with having given his word to marry her and failed to keep it, is clearly not sufficient. Each case must depend upon its own particular circumstances. It is impossible to lay down any precise rule. I think the defendant is entitled to judgment.

DENMAN, J.: I am of the same opinion, though, I must say, not without having entertained very considerable doubt. The 32 & 33 Vict. c. 68, s. 2, for the first time makes the parties to an action for breach of promise of marriage admissible witnesses, with this proviso, that "no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of *such promise*." It is a negative clause: the words are strong, and every one of them is intended to have force. The plaintiff is not to recover unless her testimony is corroborated "by some other material evidence in support of *such promise*," that is, the promise sworn to by the plaintiff herself. In order to put a proper construction upon this statute, it will be useful to compare its language with that of any other analogous statute. In the case of an application to affiliate a bastard child, 7 & 8 Vict. c. 101, s. 3, enacts that, "if the evidence of the mother be corroborated in some material particular by other testimony to the satisfaction of the justices, they may adjudge the man to be the putative father of such bastard child," &c. Those words have received a construction in a case of *Hodges v. Bennett* ('). There, the application was not made until more than twelve months after the birth of the child, and the only evidence to give the justices jurisdiction was the unsupported testimony of the complainant that the defendant had paid money for the maintenance of the child within the twelve months; and the Court of Exchequer held that corroborative evidence of that fact was unnecessary. It was not necessary that there should be evidence in corroboration of the statement of the fact which gave jurisdiction: it was enough that the evidence as to the paternity of the party charged should be confirmed in some *material particular. That seems to me to be [270 the common sense of the statute. Again, in the somewhat

(') 5 H. & N., 625; 29 L. J. (M.C.), 224.

analogous case of the accomplice, it was for some time doubted whether there need be corroborative evidence on the question as to who committed the offence. It is now settled by competent authority that it must be corroborative evidence as to the commission by the prisoner of the crime charged. In such a case as the present, it cannot be doubted that it is for the judge to tell the jury whether or not the corroboration relied on constitutes evidence in support of the promise. Unless it is, it cannot be held to be corroborative testimony within the statute. In order to see whether or not the evidence is corroborative in that sense, the judge must look at all the surrounding circumstances. If there had been no other relation between the parties here than that suggested by the plaintiff, I am not prepared to say that I should not have considered that there was corroborative or material evidence fit to be left to the jury. But I think the evidence that was relied on was more consistent with another relation existing between them than that of marriage. Looking at all the circumstances, I agree with my Brother Grove that we cannot hold what was said to Marie Bessela to amount to a corroboration of the promise alleged to have been made to her sister. I therefore think the learned commissioner did right in leaving the plaintiff to move for judgment, and I have come to the conclusion, though not without doubt, that she is not entitled to it.

Judgment for the defendant.

The plaintiff appealed.

May 7. *Torr*, Q.C., and *Crompton*, for the plaintiff.

The court called upon

Day, Q.C., and *Sutton*, for the defendant: There must be some substantial corroborative evidence in support of the promise. The whole conversation which is stated to have been overheard must be taken together. Then it amounts to no more than that the defendant said he would give the plaintiff money to go away.

[*COCKBURN*, C.J.: I think this is a plain case, and the 271] verdict should have been for the plaintiff; but the question is whether there is confirmatory evidence of the promise. I think there is and that the court below are wrong. It is not necessary to give such evidence as will prove the contract, but only confirmatory evidence of some part of it. If the jury do not believe the plaintiff's evidence that there was a contract, the confirmatory part of the evidence falls to the ground.]

The defendant did not deny what the plaintiff said to

him, and it must be therefore admitted that it cannot be argued that there was no corroborative evidence; but the corroborative evidence must be of a substantial character, which this was not.

COCKBURN, C.J.: I think the decision of the Court of Common Pleas must be overruled, as I am of opinion that that there was sufficient corroborative evidence to support the promise. The evidence given in corroboration need not go to the length of establishing the contract: if the evidence support the promise it is enough. Here the sister says that she overheard a conversation between the plaintiff and the defendant. She says she heard the plaintiff say, "You always promised to marry me, and you don't keep your word." To that the defendant makes no answer. It is true that he offered her money to go away, and it might be that a man might say, "What shall I give you to go away?" without having made any promise to marry; but, on the other hand, there is his silence, and that from silence the jury might come to the conclusion that he admitted the promise. I think the verdict is against the evidence, but I cannot say that there was no evidence to go to a jury corroborating the plaintiff's testimony.

BRAMWELL, L.J.: I am entirely of the same opinion. The judgment of the Court of Common Pleas must be reversed, and I regret it, for I see the danger of holding there was evidence in corroboration of the promise. It is not too much to suppose that a woman under similar circumstances does sometimes fancy that a promise has been made to her, nor is it too much to suppose that she will sometimes find a sister or some one who will confirm her statement as to a promise having been made. The *evidence was [272 that the plaintiff said, "You always promised to marry me, and you don't keep your word." The defendant made no answer. If we were to hold that that was no evidence of a promise, we should get rid of a great deal of evidence which is given every day at *nisi prius*. A claim is made on a man in respect of goods sold and delivered, and he does not deny it. If a statement is such that a denial of it is not to be expected, then silence is no admission of its truth; but if two persons have a conversation, in which one of them makes a statement to the disadvantage of the other, and the latter does not deny it, there is evidence of an admission that the statement is correct.

BRETT, L.J.: The evidence is that the plaintiff made this statement to the defendant and he did not deny it. The whole question was left to the jury, and they believed the

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plaintiff. Similar evidence is received every day. The defendant by his silence admits what the plaintiff said, that the defendant always promised to marry her. It was not necessary that the evidence should show a mutual promise to marry. The evidence need not prove a promise; all that is wanted is corroborative evidence of it.

Judgment reversed, and entered for the plaintiff.

Solicitor for plaintiff: *H. Sowton*, Liverpool.

Solicitor for defendant: *J. H. Lydall*, for Stephens & Danger, Liverpool.

Where it was proved on the trial that the defendant was a frequent visitor at the house of the mother of the female seduced, that he waited on her to balls and parties, and took her out frequently to ride, and when her mother spoke to him about his keeping company with her daughter, said his motives were good, it was held that such facts were proper evidence for the consideration of the jury, in corroboration of her testimony to prove that he had made to her a promise of marriage.

The testimony of the female, as to the illicit connection with the defendant, is corroborated by evidence that she was delivered of a child, of the abundant opportunity afforded to the defendant to become the father of it, and of the external evidences of the intimacy existing between the parties.

The statute does not require that the testimony of the female shall be corroborated in every particular. It is only necessary that it should be supported in the main features of the case: *The People v. Kenyon*, 5 Park. Crim. R., 254, affirmed 26 N. Y., 208; *Boyce v. People*, 55 N. Y., 644.

Under the provision of the act de-

claring that a conviction shall not be had upon the testimony of the female seduced, unsupported by other evidence, supporting evidence is only required as to the promise of marriage, and carnal connection.

As to the promise of marriage, the provision is satisfied by proof of circumstances which usually attend an engagement of marriage; as to the illicit intercourse and the immediate persuasions and the inducements which led the female to consent, evidence of opportunities more or less frequent and continued, and that the relations of the parties were such as indicated that confidence in and affection for the accused, on the part of the female, which rendered it probable that the act may have been done, are sufficient.

The fact that the prosecutrix in her testimony limits the carnal connection to a single act, and specifies the time, does not require that the supporting evidence shall be confined to that particular time; if it covers a period including the specified time it is sufficient to meet the requirements of the statute, although there is no corroborative evidence as to the particular act testified to: *Armstrong v. People*, 70 N. Y., 39.

[2 Common Pleas Division, 800.]

May 8, 1877.

*ROE V. HAMMOND and Another.

[300]

Sheriff—Fieri Facias—Poundage—Discharge Fee—Levy Fee—1 Vict. c. 55, s. 3.

If a sheriff, who has seized pursuant to a writ of *fi. fa.* the goods of an execution debtor, is paid out before sale, he is not entitled to poundage, but he is entitled to a discharge fee for the release of the goods.

The goods of the defendants were seized by the sheriff of M. under a writ of *fi. fa.* issued at the suit of the plaintiff, and afterwards a similar writ in an action by I. against one of the defendants was lodged with him. The sheriff remained in possession some days afterwards, but ultimately the amount of the judgment debts was paid on behalf of the defendants, and no part of the goods seized was sold. The sheriff claimed and received payment of a discharge fee in each action, and in the action at the suit of I., poundage and a levy fee. A rule was obtained under 1 Vict. c. 55, s. 3, for a return of these fees and the poundage:

Held, that the sheriff was not entitled to poundage, which must be returned; but that he was entitled to retain the discharge fees and the levy fee.

A RULE had been obtained under 1 Vict. c. 55, s. 3 (1), calling upon the sheriff of Middlesex, and F. Tayler and C. Tayler, his *officers, and W. Furber and R. Price, [301 to show cause why they should not return to the defendants in this action, E. W. Hammond and W. Hammond, the following sums of money taken in excess, namely, £1 1s. for costs of an interpleader summons and 4s. 6d. for a discharge fee, and also unto W. Hammond, the following other sums of money taken in excess in an action in the Ex-

(1) 1 Vict. c. 55, is intitled "An act for better regulating the fees payable to sheriffs upon the execution of civil process:" and enacts by s. 2, that "from and after the passing of this act, it shall be lawful for sheriffs or their officers, concerned in the execution of process directed to sheriffs, to demand, take, and receive such fees, and no more, as shall from time to time be allowed by any officer of the several courts of law at Westminster, charged with the duty of taxing costs in such courts, under the sanction and authority of the judges of the said courts respectively."

Sect. 3. "Any sheriff, officer, or minister, acting in the execution of process directed to any sheriff or sheriffs, or engaged or concerned therein, who shall extort, demand, take, accept, or receive from any person or persons any fee or fees, gratuity, or reward not allowed as aforesaid, or greater in amount than as allowed as aforesaid, such sheriff, or other

his officer, or minister, upon complaint thereof made against him to any of the said courts, and on proof being made thereof upon oath, either by the examination of witnesses *viva voce*, or on affidavits, or on interrogatories, to the satisfaction of the court to which the said complaint shall be made, that such sheriff, officer, or minister, as the case may be, hath offended therein as aforesaid, then and in such case every such sheriff, officer, or minister, as the case may be, shall be adjudged guilty of a contempt of such court, and punished by such court accordingly."

In the "Table of Fees, to be taken by the sheriffs, under-sheriffs, deputy-sheriffs, sheriffs' agents, bailiffs, and others, the officers or ministers of sheriffs in England and Wales, pursuant to the statute of 1 Vict. c. 55," the following items occur: "To the bailiffs for executing warrants on . . . *fi. fa.* . . . £1 1s. For the release . . . of any goods taken in execution, 4s. 6d."

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chequer Division between H. Ikin and W. Hammond, namely, £1 1s. for levy fee, 15s. for poundage, and 4s. 6d. for a discharge fee, and unto E. W. Hammond and W. Hammond the further sum of £5 5s. taken in excess in both actions for auctioneers' attendances.

The following were the material facts stated in the affidavits:

A writ of *fi. fa.* in this action indorsed to recover a judgment debt of £80 1s. 9d., having been lodged with the sheriff of Middlesex, he upon the 15th of March, 1876, granted his warrant to F. Tayler and C. Tayler, who upon the 16th of March seized and took the goods of the defendants, E. W. Hammond and W. Hammond. Upon the 17th of March, Furber & Price, who carried on business as auctioneers in partnership, were instructed on behalf of the sheriff to proceed to a sale to realize the amount of the judgment, and thereupon they prepared a draft catalogue or inventory. Upon the 18th of March, a notice signed by W. W. Read was served upon the sheriff, which claimed under a bill of sale the goods seized by him; an interpleader summons was taken out by the sheriff, and was ultimately adjoined to the 25th of March. Upon the 20th of March a writ of *fi. fa.* in *Ikin v. Hammond* indorsed to recover a judgment debt of £13 10s. was lodged with the sheriff of Middlesex, and thereupon he granted his warrant to F. Tayler and C. Tayler, to seize the goods of the defendant, W. Hammond. Furber & Price were directed to realize the amount thereof. Upon the 25th of March Read called at the office of the two Taylers, and stated that he had come for the purpose of paying the amount of the judgment debt and costs in the present action. He was referred to Furber & Price, and accordingly proceeded to their office. There was a conflict of testimony as to what passed after he reached their office. Read stated that he saw both Furber and Price, and told them that he had come to pay the debt and costs in the present action; they then informed him that they had an execution in the action of *Ikin v. Hammond* which must 302] *be paid before the sheriff could withdraw: he thereupon paid them the amount of the judgment debts, costs, and expenses in the two actions amounting to the sum of £113 16s. 9d. (1), and this amount included the items in respect of which the above mentioned rule had been obtained. Read objected to the charge of £1 1s. for the interpleader summons in this action, and also to the charge of £5 5s. for

(1) This sum included a charge for poundage in the present action; but as to this no objections were made on behalf of the defendants.

auctioneers' attendances; but Price said that £113 16s. 9d. was the amount they required and they would not take less.

According to the affidavit of Furber & Price, the latter was not present when Read called to pay the amount of the execution in this action; and Furber stated that he informed Read, that although the charge of £1 1s. for the interpleader summons could not be insisted upon, yet Read ought to pay it, because it was incurred through his making a claim which he could not sustain, and thereupon Read made no objection to paying it or the charge of £5 5s. for auctioneers' attendances. The defendants afterward repaid the sum of £113 16s. 9d. to Read. No part of the goods seized was sold by the sheriff.

Alfred Cock, for Furber & Price, showed cause: First, it is submitted that, even if extortion was committed by Furber, Price is not liable under this rule. The affidavits show that Price was not present when the executions were paid out; and as this is a penal proceeding, one partner is not responsible for the wrongful acts of another. Secondly, the levy fee in *Ikin v. Hammond* was rightly taken, for after the writ of *fi. fa.* in that action had been delivered to the sheriff, he remained in possession of the defendants' goods four or five days. Thirdly, the fee of £5 5s. is not allowed in the Table of Sheriff's Fees, and therefore *prima facie* ought not to have been taken; but the affidavits show that it was paid voluntarily, and not upon compulsion, and therefore it cannot be recovered back. Fourthly, the discharge fee was properly payable in each action, the goods having been released without sale. Fifthly, the sheriff was entitled to poundage, the amount of the judgment debts having been recovered by virtue of the writs; and [303 this is sufficient to entitle him to poundage: *Alchin v. Wells* ('). Sixthly, the cost of the interpleader summons was not, perhaps, strictly payable; but as it was incurred by reason of a claim put forward by Read, the court, in the exercise of its discretion, will not order it to be repaid.

G. Pitt Lewis (*Talfourd Salter*, Q.C., with him) for the defendants, supported the rule: First, in *Ikin v. Hammond* there was no levy upon the defendants' goods, *Nash v. Dickenson* ('), and therefore no fee was payable in respect thereof. Secondly, the discharge fees were illegally exacted; fees of this kind are payable only when goods have been seized and released without payment of the judgment debt. Thirdly, in any point of view the charge for pound-

(') 5 T. R., 470.

(') Law Rep., 2 C. P., 252.

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age was 1s. too much in *Ikin v. Hammond*, but it is submitted that none was payable. [He was then stopped.]

LORD COLERIDGE, C.J.: This is an application under 1 Vict. c. 55, s. 3, to compel the sheriff of Middlesex and his officers and assistants to return certain sums of money extorted by them in levying the amount of the judgment debt in two actions—*Roe v. Hammond* and another and *Ikin v. Hammond*. As different considerations apply to the amounts claimed, it is necessary to mention them separately. Although the sums in dispute are small, yet the matter is of importance, for it is always necessary to watch carefully the proceedings of sheriffs and their officers, and persons whose goods are sized in execution are to some extent helpless and are very much exposed to extortion. It was the object of the Legislature, in passing the statute which I have mentioned, to protect execution debtors from oppressive acts committed by sheriffs and their officers.

It has been argued on behalf of Price, that upon the facts stated in the affidavits it must be taken that the extortion, if proved, was committed by Furber alone, and that this proceeding being of a penal nature, Price is exempt from responsibility. The affidavits do not satisfy me that Price was not perfectly aware of the acts complained of at the time when they were committed; therefore he is liable to be 304] punished under this rule if any extortion *has been committed. I may say, however, that in my view, even if Price had not been present when the amount of the judgment debts was paid by Read, I should think him equally responsible with Furber—for they were partners, and the alleged wrong was committed in the transaction of the business of the partnership.

I will deal first with the levy fee in the action of *Ikin v. Hammond*. It has been objected that there was no levy; but I think, upon the facts stated in the affidavits, there was clearly a levy. The writ of *fi. fa.* was lodged with the sheriff on the 20th of March, and the amount of the judgment debt was paid on the 25th; he had been meanwhile in possession of the goods belonging to the execution debtor, and I do not think it material that he had originally seized them under another writ. The possession by the auctioneers of the goods seized was a possession under the writs of *fi. fa.* in both actions. If what was done in *Ikin v. Hammond* does not constitute a levy, it is difficult to say what does amount to it. I think, therefore, that there must be judgment for the sheriff and his officers as to the levy fee.

It has been admitted that the sum of £5 5s. for auc-

tioneers' charges not being allowed in the table of fees, was improperly taken if it was exacted against the will of the defendants. It has been contended, however, that it was paid by Read without objection, and therefore must be regarded as a voluntary payment; if this were so, it could not be recovered back; but upon the affidavits I am of opinion that it was paid under protest and upon compulsion; this sum of £5 5s. must therefore be returned.

As to the sum of 4s. 6d. taken in each action for a discharge fee, it has been contended for the defendants that it was not payable, because in *Ikin v. Hammond* there was no levy, and in *Roe v. Hammond and another* poundage was payable; but, as I have already stated, it seems to me that there was a levy in *Ikin v. Hammond*, and, for the reasons which I shall presently give, poundage could not be lawfully taken in either action. Now, when there has been a levy and yet no poundage is payable, a discharge fee may be lawfully and properly taken; it was so laid down by Jervis, C.J., with the consent of the other members of the Court* of Common Pleas in *Masters v. Lowther* (*). [305] The sheriff, therefore, was entitled to receive the discharge fee in each action, and there must be judgment for him as to the amount thereof.

As to the question raised by the charge of 15s. for poundage, it is unnecessary to determine whether more was taken than was due, even if the case made for the sheriff were correct, for we are of opinion that none could be exacted. Upon the facts before us there was in each action a levy but no sale, the execution having been paid out on behalf of the debtors. We think that seizure without sale gives no right to poundage. The practice of the courts seems to have varied in this respect. So far back as the time when Lord Mansfield was Chief Justice of the King's Bench it was said, upon inquiry into the practice of that court, that "the sheriff cannot have poundage till the goods are sold," Lofft, p. 433; and this appears to have been laid down as a rule of universal application. But it has been urged that *Alchin v. Wells* (*) shows that the sheriff, who seizes the goods of an execution debtor under a writ of *fi. fa.*, may be entitled to poundage, although there has been no sale; in my opinion, however, the facts at least of that case do not support this contention. In *Alchin v. Wells* (*) the goods of the defendant had been seized under a *fi. fa.*, before sale the parties to the action compromised, but the sheriff, before quitting possession, satisfied himself for poundage. The

(*) 11 C. B., 948, at p. 953; 21 L. J. (C.P.), 130, at p. 132.

(*) 5 T. R., 470.

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plaintiff ruled the sheriff to return the writ, and thereupon a rule was obtained to discharge the plaintiff's rule. The Court of King's Bench held that as the parties had compromised, neither of them could compel the sheriff to return the writ of *fi. fa.*, and made absolute the second rule for discharging the rule against the sheriff. This is all that was decided in the case, which is very briefly reported. It is true that the court is reported to have said that "the sheriff, who had levied under the writ, was unquestionably entitled to his poundage;" but I think at most this can only be taken as *obiter dictum*; for the question as to the sheriff's right was not strictly before the court. The decision, therefore, does not warrant the conclusion drawn from it in Watson on the Office of Sheriff, c. 5, s. 5, p. 111, 306] (2d ed.). The *reasoning in *Alchin v. Wells* (*) was commented upon by the Court of Exchequer in *Rex v. Robinson* (*), and the view which I take was substantially adopted by Parke, B. It follows that the sheriff is entitled to poundage only in respect of the amount actually realized by the sale of goods seized, for in that case it is obtained through his instrumentality. In *Chapman v. Bowlby* (*) Lord Abinger, C.B., and Parke, B., appear to have considered that *Alchin v. Wells* (*) supported the doctrine that poundage was payable, although the parties to the action compromised without a sale; but their remarks were not necessary to the decision of that case, and moreover are quite inconsistent with the observations of Parke, B., in *Rex v. Robinson* (*). The real question in *Chapman v. Bowlby* (*) was whether the second execution there levied was regular, and the question as to the right to poundage was only collateral. It follows, therefore, that as there was no sale the sheriff was not entitled to poundage; the judgment debt was not levied according to the exigency of the writ (*).

The charge of £1 1s. for an interpleader summons cannot be maintained; in fact, it has scarcely been seriously argued that the sheriff is entitled to it. The result is that the sheriff can keep the levy fee of £1 1s. and the discharge fees of 4s. 6d. each; the other sums must be returned to the defendants.

(*) 5 T. R., 470.

(*) 2 C. M. & R., 334.

(*) 8 M. & W., 249.

(*) By a writ of *fi. fa.* (Supreme Court of Judicature Act, 1875, Appendix F, 1), the sheriff is commanded that "of the goods and chattels" of the execution debt-

or he "cause to be made" the amount of the judgment debt: the form of the writ requires that the judgment shall be satisfied by means of a sale, and does not contemplate payment by or on behalf of the debtor.

GROVE, J.: I am of the same opinion. In *Sneary v. Abdy* (') the question as to the sheriff's right to poundage did not directly arise: the point in dispute was whether the sheriff could, without instructions from the execution creditor, sell a portion of the goods seized in order to satisfy his possession-money, fees, and expenses, the execution creditor having become disentitled to recover the judgment debt: as to this there was difference of opinion upon the bench; my Brother Cleasby thought the sheriff could sell, my Brother Field and myself thought he could not. *It was, therefore, unnecessary to consider the right [307 to poundage: but as one of the judges who decided the case, I may say that we all were of opinion that the right to poundage depended upon an actual levy of the debt ('). The words of 29 Eliz. c. 4 ('), are very strong to show that the right of the sheriff to poundage is dependent upon an actual sale, and Lord Ellenborough in *Bilke v. Havelock* (') said: "If the goods are sold, he receives in poundage the specific recompense for his trouble which the law has provided." This plainly implies that without a sale the sheriff has no right to poundage.

As to the question raised as to the liability of Price, I think that the affidavits are unsatisfactory, and therefore that he is equally liable with Furber: but I incline to think that he would be liable under this rule without actual knowledge of the extortion; for they were partners, and the wrongful act was committed in the course of the partnership business.

LINDLEY, J.: I agree with the conclusions at which the Lord Chief Justice and my Brother Grove have arrived. But, speaking for myself, I may say that I should hesitate to hold as matter of law that under this rule Price would,

(') 1 Ex. D., 299.

(*) See per Field, J., in *Sneary v. Abdy*, 1 Ex. D., 299, at pp. 306, 307.

(*) 29 Eliz., c. 4, is intitled "An act to prevent Extortion in Sheriffs, Under-Sheriffs, and Bailiffs of Franchises or Liberties, in cases of Executions," and enacts that "it shall not be lawful . . . to or for any sheriff, under-sheriff, bailiff of franchises or liberties, nor for any of their or either of their officers, ministers, servants, bailiffs or deputies, nor for any of them, by reason or color of their or either of their office or offices, to have, receive, or take of any person or persons whatsoever, directly or indirectly, for the serving and executing of any extent

or execution upon the body, lands, goods, or chattels of any person or persons whatsoever, more or other consideration or recompense than in this present act is and shall be limited and appointed, which shall be lawful to be had, received, and taken, that is to say, twelve pence of and for every twenty shillings, where the sum exceedeth not one hundred pounds, and sixpence of and for every twenty shillings, being over and above the said sum of one hundred pounds, that he or they shall so levy or extend and deliver in execution, by virtue and force of any extent or execution whatsoever."

(*) 8 Camp., 374.

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without actual knowledge on his part, be responsible for the acts of Furber; for there may be a difference between civil liability and a penal proceeding; but I decide against 308] Furber upon the affidavits. The rule must be *made absolute to return the costs of the interpleader summons in *Roe v. Hammond and another*, and the poundage in *Ikin v. Hammond*, and the auctioneers' expenses in the two actions; and the costs of this rule must be borne by all the parties against whom it was obtained.

Rule absolute accordingly.

Solicitor for Furber & Price: *A. O. Underwood.*

Solicitor for defendants: *F. Norton.*

See note to *Bissicks v. Colliery Co.*, *post*, p. 558.

[2 Common Please Division, 308.]

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WHITE V. FRANCE.

Negligence—Licensee—Invitation—Concealed Danger.

A barge of the defendant being unlawfully navigated on the river T., the plaintiff, a waterman, complained to the man in charge, who referred him to R., the defendant's foreman; the plaintiff went to the defendant's wharf in order to speak to R., and whilst he was there a bale of goods, by the negligence of the defendant's servants, fell upon him and injured him; the plaintiff had had no warning that the bale might fall:

Held, that the plaintiff was entitled to maintain an action for the injury sustained by him.

Corby v. Hill (4 C. B. (N.S.), 556; 27 L. J. (C.P.), 318), and *Indermaur v. Dames* (Law Rep., 1 C. P., 274; and on appeal, Law Rep., 2 C. P., 311), followed.

THIS was an action tried before the deputy judge of the county court of Surrey held at Southwark. The plaintiff claimed to recover damages for an injury sustained by him through the alleged negligence of the defendant's servants. The facts are set out in the judgment of the court, and in addition thereto it is only necessary to mention the following circumstances:—

At the trial it was admitted that the plaintiff's only interest in complaining of the navigation of the barge was that it was illegal, and it was also admitted that he wanted to get employment from the defendant; it was further proved that it was customary for lightermen to tender their services, when a barge of above fifty tons burden was navigated on the Thames by one man only. The defendant was the occupier of a wharf in Tooley Street, Southwark, where the accident happened.

The deputy judge of the county court asked the jury, first, *whether there had been an invitation to the [309 plaintiff to go to the defendant's wharf; secondly, whether the defendant's servants had been guilty of negligence; thirdly, whether the plaintiff had been guilty of contributory negligence. The deputy judge told the jury that these three questions must be found in the plaintiff's favor before he could be entitled to a verdict; and, further, that if the plaintiff went on the defendant's wharf merely on his own business, without any invitation, the defendant was not responsible. The jury found a verdict for the plaintiff for £35 damages.

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An order for a new trial was obtained on the ground that there was no invitation to the plaintiff, and that the plaintiff at the time of the alleged negligence of the defendant was a bare licensee; and on the ground of misdirection by the deputy judge, in not telling the jury that there was no concealed danger at the defendant's wharf, and that the peril, if any, was apparent and known by the plaintiff.

April 27. *Kemp*, Q.C., showed cause.

R. A. McCall supported the order.

The following authorities were cited: *Scott v. London and St. Catherine Docks Co.* (*); *Toomey v. London, Brighton and South Coast Ry. Co.* (*); *Wilkinson v. Fairrie* (*); *Holmes v. North Eastern Ry. Co.* (*).

Cur. adv. vult.

June 7. The judgment of the Court (Denman and Lopes, JJ.) was delivered by

DENMAN, J.: In this case the facts were as follows:

The plaintiff, a licensed waterman, was on the day before the day in question waiting for employment. According to a rule of the Thames Conservancy Board, barges of over fifty tons burden ought to have two men employed to work them. The defendant's barge had been used with one man only, and the plaintiff went to complain to the person in charge; he was referred to one Recknell, the defendant's 310] foreman, who would be there the next day. On *the next day he was going to see Recknell, and was walking towards him on the defendant's premises, when a bale of goods, which had been, as the jury found, negligently left by the defendant's servants nicely balanced at the edge of the warehouse trap-door, from which such bales are lowered, suddenly fell upon the plaintiff and injured him.

Under these circumstances we think the verdict for the plaintiff was warranted by the authority of *Corby v. Hill* (*), and *Indermaur v. Dames* (*), and other cases. He was there on lawful business, in which both the plaintiff and the defendant had an interest, and he was there by the invitation of the defendant's servant, who referred him to the foreman in a matter relating to the defendant's business. He was proceeding to the place mentioned by those who

(*) 8 H. & C., 596; 34 L. J. (Ex.), 220.

(*) 4 C. B. (N.S.), 556; 27 L. J. (C.P.),

(*) 8 C. B. (N.S.), 146; 27 L. J. 318.

(C.P.), 39.

(*) 1 H. & C., 638; 32 L. J. (Ex.), 73.

(*) Law Rep., 1 C. P., 274; on appeal, Law Rep., 2 C. P., 311.

(*) Law Rep., 4 Ex., 254; on appeal, Law Rep., 6 Ex., 123.

directed him, and the bale which caused the injury was placed in such a position as to be dangerous, and yet to give no warning of danger to any one passing by the spot where it fell, so that it was in the nature of a "trap" or a concealed source of mischief, within the meaning of those words, as used in *Bolch v. Smith* (¹), and in the case of *Sullivan v. Waters* (²), cited by the counsel for the defendant; so that whether the plaintiff could be properly described as a bare licensee or not, the defendant would be liable.

We, therefore, think that the order ought to be discharged.

Order discharged.

Solicitors for plaintiff: *Crook & Smith.*

Solicitors for defendant: *Lewis & Watson.*

(¹) 7 H. & N., 736; 31 L. J. (Ex.), 201.

(²) 14 Ir. C. L. Rep., 460.

See 14 Eng. Rep., 846 note; 19 Eng. Rep., 340 note.

The owner of a building, attached to which a statute requires a fire escape, owes no duty to the tenant or his family to keep the platform of the fire escape communicating with the window in such repair that it may be used as a balcony; and when it bears no indication that it was designed to be so used, and is not so guarded as to make it safe for young children, if a child without license or permission from the owner passes out of the window upon the platform, and is injured in consequence of its being out of repair, the owner is not liable.

Such a case does not come within the rule requiring a party to protect a structure on his own premises which is dangerous to others: *McAlpine v. Powell*, 70 N. Y. R., 126, reversing 1 Abb. N. C., 427, and distinguishing *Lynch v. Nordin*, 1 Ad. & Ell., N.S., 29; *R. R. Co. v. Stout*, 12 Wall., 657; *Keefe v. Milwaukee*, etc., 21 Minn., 207.

The part of defendant's office devoted to the public was some 16½ feet long from south to north, the entrance door being at the south, and the width was 5 feet 7 inches. About 4 feet 9 inches from the south, and on the east wall, was a desk or counter for writing messages, 7 feet 6 inches long, and one foot 7 inches wide. About 5 inches

north of the counter, and in the centre of the apartment, there was a trap door leading to the cellar, about 2 feet 9 inches square. On the west side of the apartment there was a partition about 6 feet high, separating the public office from the operator's apartment, the entrance to which was at the north end of the partition. In this partition there was an opening with a desk in it, where also messages were written and delivered to the operator. D. came in quickly to send a message, spoke to the operator at this opening, and then went beyond the counter as if to go into the operator's room, when, the trap being open, he fell through into the cellar, and received injuries of which he died. There was evidence given to show that deceased said it was his own fault, and that he ought not to have been where he was; that the office was a very light one, and that there was no difficulty in seeing the trap, but it also appeared that other persons on other occasions had nearly fallen into it.

The learned judge, who tried the case without a jury, and viewed the premises, found that the deceased was guilty of contributory negligence, which precluded the plaintiff, his administratrix, from recovering.

Held that defendants were liable; that the evidence of the open trap door in the part appropriated to the public

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was negligence for which defendants Denny v. Montreal, etc., 42 U. C. Q. B., were chargeable; and that there was 577.
no evidence of contributory negligence on the part of the deceased: See 19 Albany L. J., 267; Thayer v. Jarvis, 44 Wisc., 388.

[2 Common Pleas Division, 811.]

June 7, 1877.

311] *NELSON V. THE LIVERPOOL BREWERY COMPANY.

Landlord and Tenant—Liability of Landlord for Injury happening to Stranger during Tenancy—Liability of Landlord for defective Repair of demised House—Negligence.

A landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has contracted with the tenant to repair, or when he has been guilty of misfeasance, as, for instance, in letting the premises in a ruinous condition: in all other cases he is exempt from responsibility for accidents happening to strangers during the tenancy.

The defendants let to F. a house by an agreement in writing, by which F. agreed "to do all necessary repairs to the said premises except main walls, roof, and main timbers." There was no agreement by the defendants to repair, and the house was in good condition at the time of letting it. Owing to the defendants' negligence in not repairing a part of the main walls, a chimney-pot during the tenancy of F. fell upon the plaintiff, who was a servant of F., and injured him:

Held, that the plaintiff was not entitled to recover compensation from the defendants for the injury sustained by him.

THE facts of this case are sufficiently stated in the judgment of the court.

April 24. *Potter*, for the plaintiff, showed cause.

W. R. Kennedy, for the defendants, supported the rule.

The following authorities were cited: As to the liability of a landlord to repair, *Woodfall's Landlord and Tenant*, 9th ed., ch. 12, s. 1 (b), p. 488; as to the liability of the owner or occupier of a dangerous building or ship towards a servant or person employed therein, *Seymour v. Maddox* ('); *Couch v. Steel* ('); *Riley v. Baxendale* ('); towards a visitor, *Southcote v. Stanley* ('); and towards a licensee, *Indermaur v. Dames* ('); as to the effect of knowledge by a servant that he is employed by his master in a dangerous occupation; *Assop v. Yates* ('). *Cur. adv. vult.*

312] *June 7. The judgment of the Court (Denman and Lopes, JJ.) was delivered by.

LOPES, J.: This was an action brought in the Liverpool Passage Court by the plaintiff against the defendants to recover damages for injuries occasioned by the defendants' negligence. A verdict was found for the plaintiff for £80, leave being given to the defendants to move to set aside the

(1) 16 Q. B., 326; 20 L. J. (Q.B.), 327.

(5) Law Rep., 1 C. P., 274; on app., 2

(2) 8 E. & B., 402; 23 L. J. (Q.B.), 121.

C. P., 311.

(3) 6 H. & N., 445; 30 L. J. (Ex.), 87.

(6) 2 H. & N., 768; S. C., sub. nom.

(4) 1 H. & N., 247; 25 L. J. (Ex.), 339.

Assop v. Yates, 27 L. J. (Ex.), 156.

verdict and enter a nonsuit, on the ground that the facts proved by the plaintiff disclosed no cause of action against the defendants.

The facts shortly were as follows: One Farragher became the tenant to the defendants under an agreement dated the 10th of June, 1875, of a certain public house, the property of the defendants, Farragher agreeing "to do all necessary repairs to the said premises except main walls, roof, and main timbers." There was no agreement to repair by the landlords, and it was admitted that the premises were not out of repair when Farragher became tenant. The plaintiff was a barman in the employ of Farragher, and on the 23d of December, 1875, was knocked down by a chimney-pot falling on him from the premises in question as he crossed the yard, whereby he was seriously injured. The chimney-pot had been out of place for three weeks to the plaintiff's and Farragher's knowledge, and Farragher had given the defendants notice that it was overhanging the street, and had received from them a reply to the effect that they had given instructions that it should be looked to; the defendants had moreover sent a man to look at it. Evidence of a custom for landlords to do external repairs, when there was no express agreement on the subject, was given. The judge left several questions to the jury, which, so far as material, were as follows: First, whether upon the evidence of usage the defendants were liable to repair? to which the jury replied in the affirmative; secondly, whether the chimney-pot was part of the main wall? to which they gave a similar reply; thirdly, whether the defendants were guilty of negligence, and whether by reason thereof the accident happened? which was also answered in the affirmative.

We are of opinion on the facts proved that the plaintiff has no cause of action against the defendants. We think the custom of *which evidence was given for land- [313] lords to do external repairs, when there is no express provision to that effect, was not such as could be incorporated in the agreement; nor such a custom as could create any liability in the defendants; it appeared to be a practice amongst landlords to repair for their own interest, and not a uniform, certain, and well established usage.

We think there are only two ways in which landlords or owners can be made liable, in the case of an injury to a stranger by the defective repair of premises let to a tenant, the occupier and the occupier alone being *prima facie* liable: first, in the case of a contract by the landlord to do repairs,

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where the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition. In either of these cases we think an action would lie against the owner: see *Payne v. Rogers* ('); *Todd v. Flight* ('); *Russell v. Shenton* ('); *Pretty and Wife v. Bickmore* (').

In the present case, however, there is no contract by the defendants, the landlords, to do repairs, and it is admitted that the premises were not out of repair when Farragher became the tenant. We think, therefore, the rule should be made absolute to enter a nonsuit.

Rule absolute.

Solicitor for plaintiff: *William Lowe*, Liverpool.

Solicitors for defendants: *Haigh & Son*, Liverpool.

(1) 2 H. Bl., 349.

(2) 9 C. B. (N.S.), 377; 30 L. J. (C.P.), 21.

(3) 3 Q. B., 449.

(4) Law Rep., 8 C. P., 401; see *Gwin-*

nell v. Eamer and Wife (Law Rep., 10 C. P., 658; 14 Eng. R., 492), where *Pretty and Wife v. Bickmore* was followed and approved.

See 14 Eng. Rep., 496 note; 14 Eng. Rep., 543 note; 19 Am. Rep., 328 note; 6 Eng. R., 185 note; *Brown v. Francomb*, 9 Best & Smith, 1; *Gaudy v. Jubber*, Id., 15 note; 14 Canada Law Journal, 46.

Where premises are occupied by a tenant, an agent of the owner cannot be proceeded against under a municipal ordinance for failing to remove a nuisance therefrom.

The tenant's possession and control of leased premises are inviolable by the landlord or his agent, except for purposes pertaining to the preservation of the freehold.

Power given by charter to the mayor and council of the city of St. Louis, "to provide by ordinance for the abatement of nuisance and the preservation of the public health," will not sustain an ordinance made under color thereof, or authorize an interpretation of such an ordinance to an effect which would be in violation of the laws of the state: *City of St. Louis v. Kaime*, 2 Missouri Appeal Reports, 66.

The obligation of a landlord to repair demised premises rests solely upon express contract. A covenant to repair will not be implied, nor will an express covenant be enlarged by construction. A lease from defendant to

plaintiff contained a paragraph with three clauses:

1st. In case the premises should be partially damaged by fire, but not rendered untenable, the same were to be repaired with all convenient speed at the expense of the lessor.

2d. In case they were rendered untenable, the rent was to be paid up to the time of fire, and then to cease until the premises were put in repair.

3d. In case of total destruction the lease was to cease upon payment of the rent up to that time, otherwise to remain in force at the option of the lessor. The contingency provided for by the second clause occurred. Defendant determined not to repair, but to rebuild and to terminate the lease.

In an action to recover damages, held that it was optional with defendant to continue the tenancy by repairing the premises or to terminate the lease, and that plaintiff had no cause of action: *Witty v. Matthews*, 52 N. Y., 512.

Where the corporate authorities of a city have knowledge of the fact that a lot owner is constructing a vault under the sidewalk for his own convenience, and make no objection, authority to construct the same may be inferred; and when the same is continued for

many years without objection, the acquiescence on the part of the city will be regarded as sufficient authority to construct and maintain it in a careful and prudent manner.

Where the owner or occupant of premises creates a nuisance in the sidewalk adjoining the same, without the authority of the municipal authorities, either express or implied, and the city is compelled to pay damages to a person for a personal injury caused by the same, the author of such nuisance will be responsible to the city for the damages so paid by it.

The general rule is, that the occupant and not the owner, as such, is responsible for injuries received in consequence of a failure to keep the premises occupied in repair. The landlord, however, is liable where he has expressly agreed to keep the premises in repair, and where the premises are let with a nuisance upon them: *Gridley v. City of Bloomington*, 68 Ills., 47; *Severn v. Eddy*, 52 Ills., 189.

A landlord who has demised property, parting with possession and control thereof to a tenant in occupation, is not responsible for injuries arising from defective condition of such premises, where that defect arises during the continuance of the lease.

Upon leased premises, a water pipe and gutter, not defective in their original construction, became stopped up, so that water flowed upon the door steps of the leased house, forming ice, upon which plaintiff fell and was injured. As between lessor and lessee, in the absence of contract to the contrary, it is the duty of the latter to repair the pipe or remove the ice, and for failure in this he is liable, and not the landlord.

If the defective condition of leased premises occasions damage, in order to make the lessor or landlord responsible, it is not sufficient merely to allege ownership in him, but the special circumstances creating his liability must be averred: *Schindelbock v. Moon*, 17 Am. L. Reg. (N.S.), 450, Ohio Commission.

The defendant, being the owner of a lot of ground, erected thereon a storehouse, and afterward leased the storehouse, and agreed with the lessee to construct therein cornices, shelving and

fixtures, in a secure, safe, convenient and proper manner for the sale of dry goods and groceries, and to keep the premises in good order. The fixtures put up under the agreement were unsafe and insecure, from the want of sufficient fastening to the walls of the building—all of which was known to defendant, who, on request of the lessee, refused and neglected to repair. Afterward, and while the room and fixtures were in the possession of the lessee, the shelvings fell and injured the plaintiff, who was at the time in the storeroom as a customer of the lessee. Held, the facts stated do not constitute a cause of action against the defendant and in favor of the plaintiff: *Burdick v. Cheadle*, 26 Ohio St., 393.

The duty of keeping in repair fire escapes attached to a tenement house, imposed by the charter of the City of Brooklyn of 1863 (§ 86, title 12, chap. 863, Laws 1863), is devolved upon the owner; and in the absence of a special agreement between him and a tenant occupying a room in the building, to the window of which a fire escape is attached, as between the landlord and tenant, it is the duty of the former to keep it in repair. It is not within the range of ordinary repairs which a tenant, in the absence of an agreement to the contrary, is required to make: *McAlpin v. Powell*, 70 N. Y., 126, reversing 1 Abb. N. C., 427.

Where the owner of real estate, on which was a kiln for drying lumber, leased said real estate, receiving rent therefor, knowing that the kiln would be used by the lessee for drying lumber, and knowing or having reason to believe that such use would be dangerous to the neighboring house of a third person, and said house was burned by fire communicated from said kiln in such use thereof by the lessee, said owner was liable to said third person for the injury so occasioned: *Helwig v. Jordan*, 53 Ind. Rep., 21.

An unauthorized excavation in a street of a city for the benefit of adjoining premises is a nuisance, and all persons who continue, or in any way become responsible for it, are liable to any person who is injured thereby, irrespective of any question of negligence. If the excavation is by license of com-

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petent authority, the one making it is bound to do it in a careful manner, and to see that it is properly and carefully covered, so as to make the street as safe for passage as before. A liability attaches to whomsoever subsequently continues and uses it in an improper or unsafe condition. Notice of a defect which could be discovered by proper examination is not necessary in order to fix this liability.

Accordingly held, that where a coal-hole had been excavated in the sidewalk of a city, and not properly covered, which coal-hole was used by a lessee of the premises for the benefit of which it was excavated, and to which it was appurtenant, and in consequence of the defective covering a person passing by fell through and was injured, that the lessee was liable separately or jointly with the lessor for the injuries resulting: *Irvine v. Wood*, 51 N. Y., 224; *Severn v. Eddy*, 52 Ill., 189.

The owner of a building to the chimney of which a gas company has, without the owner's consent, so affixed a wire as to render the chimney unsafe, and ultimately to cause its fall upon a passer-by, may be liable for the damage so caused; and if, when so liable, he pays the damage, he has an action against the company for indemnity: *Gray v. Boston Gas Light Company*, 114 Mass., 149, 19 Am. Rep., 324.

Where one person owns the lower story of a building, and another the upper story, with right of way thereto, the latter cannot recover of the former for necessary repairs of the roof made by him. It would seem that the person owning the upper story would be under obligation to keep the roof in repair, and that a like rule would apply to the owner of the lower stories, as to the foundation: *Ottumwa Lodge, etc., v. Lewis*, 34 Iowa, 67.

[2 Common Pleas Division, 342.]

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*PATRICK V. MILNER and Another.

Conditions of Sale—Time, Essence of the Contract—Sale of Contingent Reversionary Interest in Railway Stock—Return of Deposit.

The defendants, on the 6th of July, 1876, sold to the plaintiff by auction a reversion in railway stock, expectant on the decease of a married lady without issue who should attain the age of twenty-one years. The lady was then in her forty-fourth year, and had never had any children. The sale was subject to conditions, whereby it was provided that the purchaser should pay a deposit and the purchase be completed on or before the 17th of August then next; "but should the completion of the purchase be delayed from any cause whatever beyond that period, the purchaser is (but without prejudice nevertheless to the vendor's rights under the seventh or any other condition of sale) to pay interest on the balance of the purchase-money from that day until the completion of the purchase." By the seventh condition, should the purchaser neglect or fail to comply with any condition, "the deposit money shall be forfeited and the vendor . . . shall be at full liberty to resell the property . . . and the deficiency (if any) arising by such second sale, together with all charges attending the same, shall be made good by the defaulter." There was no express stipulation that time should be of the essence of the contract. The plaintiff at the time of sale paid a deposit of £80. The defendants were not able to complete the sale on or before the 17th of August, and the plaintiff two days afterwards brought his action to recover the deposit. The defendants were able and willing to complete the sale at the end of November, 1876:

Held, that under the conditions time was not of the essence of the contract, and the plaintiff was not entitled to recover.

SPECIAL CASE. The defendant Milner was an auctioneer carrying on business in London under the style of Marsh, Milner & Co., and the defendant A. C. Scoles, a solicitor. The defendant Scoles had for some years acted as agent for R. Groom, then in Tasmania, and had managed his affairs in England under a general power of attorney dated the 9th of January, 1872. Groom was entitled to the reversion hereinafter described, and on the 6th of July, 1876, Scoles caused it to be put up for sale at public auction by the defendant Milner under general conditions applying to all lots then offered for sale. The conditions, so far as material, were as follows:—

“3d. That the purchasers shall pay down immediately into the hands of Marsh, Milner & Co., a deposit of £20 per cent. in part of the purchase-money for each lot, and sign agreements for payment *of the remainder on or be- [343 fore the 17th of August next at the offices of the respective vendors’ solicitors, when and where the purchases are to be completed; but should the completion of the purchases be delayed from any cause whatever beyond that period, the purchasers are (but without prejudice nevertheless to the vendors’ rights under the seventh or any other condition of sale) to pay interest on the balance of the purchase-money from that day until the completion of their purchase at the rate of £5 per cent. per annum.

“4th. That the purchasers shall have proper conveyances, assignments, or transfers of the lots from all necessary parties at the expense of the purchasers on payment of the remainder of the purchase-money agreeably to the third condition, and will be entitled to all advantages on the reversions and policies from the hour of sale and to the current half-year’s dividends or the interest on annuities, life interests, mortgages, shares, &c.

“7th. That should any or either of the purchasers neglect or fail to comply with any or either of the above conditions, or the conditions referred to below, the deposit money shall be forfeited, and the vendors or vendor, as the case may require, shall be at full liberty to resell the property sold to such purchaser or purchasers either by public or private sale, and the deficiency (if any) arising by such second sale, together with all charges attending the same, shall be made good by the defaulter or defaulters at this present sale, and be recoverable as liquidated damages,” &c.

In the catalogue of sale for the 6th of July, 1876, the reversion belonging to R. Groom was described as follows:—

“Lot 6. The reversion to a moiety of £920 Great Western

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Railway Five per Cent. Consolidated Guaranteed Stock, expectant on the decease of a married lady, now in her forty-fourth year, dying without issue, or any she may have dying before attaining the age of twenty-one years. The tenant for life has been married nine years, and has never had any children. Duty at three per cent.

"Special condition as to Lot 6. The assignment or other necessary deed will be executed by Mr. Scoles under a power of attorney, the vendor being now resident in Tas-344] mania. An attested *copy of the power of attorney will be supplied at the vendor's expense."

There was not in the general or special conditions or particulars any express stipulation that time was to be of the essence of the contract.

The plaintiff was the highest bidder for the above mentioned reversion, and the same was knocked down to him for £150, and he thereupon paid to the defendant Milner £30 as a deposit on account of the purchase, and received the following contract signed by him:—

"I, J. T. A. Patrick, . . . do hereby acknowledge myself to be the purchaser of Lot 6, as described in the within particulars, at the auction held this 6th of July, 1876, and have paid £30 as a deposit and in part payment of the said purchase. And I hereby contract and agree with the vendor to complete the purchase of the said lot in every respect agreeably to the within particulars and conditions of sale.

"Witness my hand this 6th of July, 1876.

£150 0 0 Amount of sale.

30 0 0 Deposit.

£120 0 0 Balance.

"We ratify this sale on behalf of Augustus Scoles, the vendor, and as auctioneers and stakeholders acknowledge the receipt of the deposit above mentioned.

"Marsh, Milner & Co."

On the 7th of July, 1876, the defendant Scoles forwarded to the plaintiff an abstract of the vendor's title to the reversion, with a copy of the power of attorney of the 9th of January, 1872, and on the 14th of July the plaintiff objected by a letter to the defendant Scoles that the power of attorney contained no authority to deal with the reversion or execute an assignment, and demanded a return of the deposit of £30. The defendant Scoles admitted, as the fact was, that the power of attorney did not authorize him to execute an assignment, but offered to send a deed of con-

veyance to Tasmania to be executed by the vendor, and on the plaintiff *refusing these terms he said he would [345 obtain a special power to execute the assignment and complete the sale to the plaintiff: he also offered to waive all claim to interest upon the unpaid balance of the purchase-money.

On the 19th of August, 1876, the plaintiff issued a writ against the defendants for the return of the deposit. The defendant Milner claimed no interest in the matter in dispute, but was merely a stakeholder of the deposit.

The defendant Scoles afterwards procured from R. Groom, the vendor, a special power of attorney to complete the sale and to execute the assignment of the reversion. This power of attorney was dated the 20th of September, 1876, was received by the defendant Scoles on the 21st of November, 1876, and a copy furnished to the plaintiff on the following day. The plaintiff still declined to complete, and claimed the return of the deposit.

The questions for the opinion of the court were, first, whether under the circumstances the plaintiff was entitled to the return of his deposit; or, in the alternative, secondly, whether he ought not to complete the contract.

During the argument it was admitted by the plaintiff's counsel that at the time of sale Scoles was in fact authorized to sell the reversion, R. Groom having requested him by letter to do so.

Edward Ford (*Poulter* with him), for the plaintiff: The defendant Scoles was not ready to complete on the 17th of August, and therefore in a court of common law the plaintiff would have been entitled to recover the deposit: 1 *Dart on Vendors and Purchasers*, 5th ed., ch. 10, s. 1, p. 417. It must be admitted that under the Supreme Court of Judicature Act, 1873, s. 25, subs. 7, which applies to all the divisions of the High Court of Justice, a stipulation as to time is not to be deemed of the essence of the contract, except in those cases where before that statute it would have been so construed in a court of equity; but upon the sale of a reversion, time has always been deemed in a court of equity to be of the essence of the contract, 1 *Dart on Vendors and Purchasers*, 5th ed., ch. 10, s. 1, p. 419; *Newman v. Rogers* (1); *Hipwell v. Knight* (2); and here the reversion sold is contingent, as *it may be defeated upon the birth of a [346 child who shall attain the age of twenty-one years.

[*LOPES, J.*: When the vendor was in default, the proper course for the plaintiff, as purchaser, to take was to give

(1) 4 Bro. C. C., 391.

(2) 1 Y. & C. Ex. in Eq., 401, at p. 416.

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the defendant Scoles notice to complete the sale within a reasonable time, Sugden on Vendors and Purchasers, 14th ed., ch. 6, s. 3, par. 15, p. 268; but no notice was given, and the writ was issued two days after the day appointed for the completion of the sale.]

No notice to complete was necessary, the parties having fixed peremptorily a time to carry out the sale; and it is clear that by agreement time may be made of the essence of the contract: *Boehm v. Wood* (*). The cases of *Wells v. Maxwell* (No. 1) (*) and *Webb v. Hughes* (*), which may perhaps be relied on by the defendants, are not in point, for *Wells v. Maxwell* (*) related to the sale of land with possession, and *Webb v. Hughes* (*) to the sale of a residence. Whenever the property sold is of an uncertain or fluctuating value, the contract must be completed at the prescribed time: *Day v. Luhke* (*). If the plaintiff, as purchaser, is forced to accept the conveyance of the reversion, he may at the option of the vendor be compelled to undergo the hardship of having to pay interest upon the balance of the purchase-money: for under the last clause of the third condition he would be relieved from the payment of interest only if the vendor should be guilty of wilful default: 1 Dart on Vendors and Purchasers, 5th ed., ch. 4, s. 3, p. 127, and 2 Ibid, ch. 13, s. 4, p. 636; *Greenwood v. Churchill* (*); *Lord Palmerston v. Turner* (*).

Meadows White, Q.C. (*F. Pain* with him), for the defendants: First, no deed for the formal conveyance of the property sold was necessary; for a reversion in railway stock is merely an equitable interest, and does not fall within the words of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 14, which requires a deed to be executed for the transfer of shares or stock. As it is admitted that at the time of sale Scoles was in fact authorized to assign the [347] reversion, the purchase might have been *completed upon the 17th of August without any deed. Therefore the objection to the title raised by the plaintiff on the 14th of July was illusory, and the defendants are entitled to judgment on the ground that the defendant Scoles was able and willing to convey on the appointed day.

[GROVE, J.: The defendants cannot succeed on this ground. The fourth condition seems to point to the execution of a deed by or on behalf of the vendor. In any view,

(*) 1 Jac. & W., 419.

(*) 32 Beav., 408.

(*) Law Rep., 10 Eq., 281.

(*) Law Rep., 5 Eq., 336; *Day v. Luhke* was approved of in *Claydon v.*

Green, Law Rep., 3 C. P., 511, and in *Cowles v. Gale*, Law Rep., 7 Ch., 12.

(*) 8 Beav., 413.

(*) 33 Beav., 524.

the parties proceeded upon the assumption that a deed was necessary to perfect the conveyance of the reversion; and it appears that the power of attorney authorizing Scoles to execute an assignment was not received by him until the 21st of November, three months after the appointed day.]

Secondly, time was not of the essence of the contract. *Webb v. Hughes* (1) is a direct authority for the defendants. Time becomes only of the essence of the contract when it has been made so by direct stipulation or necessary implication: *Parkin v. Thorold* (2). The stipulation that the purchaser should pay interest was proper, for the reversion became more valuable from lapse of time: *Child v. Lord Abingdon* (3). The delay was not unreasonable; and it may well be that owing to the seventh condition time is of the essence of the contract as against the purchaser, although it is not so as against the vendor.

Ford, in reply: A deed was necessary to complete the assignment to the plaintiff; for he, as purchaser, could claim from the vendor the protection of covenants for title. It is of no consequence that the defendant Scoles could make a perfect conveyance of the reversion after action brought, *Cernish v. Rowley* (4); the material day was the 17th of August, when he was bound to be ready to complete.

GROVE, J.: The real question arising upon this case, in the form in which it is presented to us, is whether time is of the essence of the contract; and the authorities show that this question depends upon the nature of the property, upon the construction of the *contract, and upon the [348 objects which the parties had in entering into it, or, as it may be better expressed, upon what must be judicially assumed to have been their intention; for that may sometimes be different from their actual intention. In the present case the dispute has arisen out of the sale of a reversion in railway stock. The reversion is contingent, that is, it is expectant upon the death without issue who shall attain the age of twenty-one years of a woman aged forty-three years, who has been married nine years and has never had any issue; it is therefore a reversion which, it is highly probable, will ultimately come into possession. The sale was subject to certain conditions, the third of which provided as follows: "The purchasers shall pay down immediately into the hands of Marsh, Milner & Co., a deposit of £20 per cent. in part of the purchase-money for each lot and sign agree-

(1) Law Rep., 10 Eq., 281.

(2) 16 Beav., 59, at p. 65.

(3) 1 Ves. Jun., 24.

(4) 1 Selw. N. P., ch. vii, pp. 218, 219, 13th ed.

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ments for payment of the remainder on or before the 17th of August next at the offices of the respective vendors' solicitors, when and where the purchases are to be completed." Pausing here for a moment, I incline to think that if the condition had stopped there, fair ground would have existed for contending that the parties must be taken to have intended that time should be of the essence of the contract; for the authorities cited during the argument seem to show that it is imperative to complete the sale of a reversion within the appointed time; but then the subsequent words put a very different complexion on the case, "but should the completion of the purchases be delayed from any cause whatever beyond that period, the purchasers are (but without prejudice nevertheless to the vendors' rights under the seventh or any other condition of sale) to pay interest on the balance of the purchase-money from that day until the completion of their purchase at the rate of £5 per cent. per annum." Now these latter words, which form the final clause of the third condition, make it quite clear that the parties to the sale contemplated the possible occurrence of a delay in completing the contract, and that they intended, in the event of that delay happening, to keep alive the bargain which had been entered into. In the present case no question arises as to whether the delay which did take place was unreasonable, and it has been admitted that Scoles at the time of the sale had been in fact authorized to sell; consequently the only 349] *difficulty was as to the form of the conveyance. I therefore think that in the present case time was not of the essence of the contract. *Parkin v. Thorold* (1) shows the rule to be that time is not of the essence of the contract unless it is made so by direct stipulation or necessary implication. In *Webb v. Hughes* (2) it was contended on behalf of the vendor that the purchaser had waived the delay occurring through the default of the vendor, and Vice-Chancellor Malins held that there had been waiver. No question as to waiver has been or could be raised before us; but the conditions in that case were very similar to the conditions in the present action, and the Vice-Chancellor there (3), expressed an opinion that the agreement between the parties did not make time of the essence of the contract, "because the very condition shows that the execution of the contract might from some causes be postponed, and, in that case, interest was to be paid upon the purchase-money until the completion of the purchase." The

(1) 16 Beav., 59.

(2) Law Rep., 10 Eq., 281.

(3) Law Rep., 10 Eq., 286.

condition alluded to was in fact identical with the third condition mentioned in the special case, except that it did not contain the words within brackets, "but without prejudice nevertheless to the vendors' rights under the seventh or any other condition of sale." The seventh condition provides, that if a purchaser fails to comply with the conditions, the deposit-money shall be forfeited and the vendor may resell. At first sight this seems to favor the view on behalf of the plaintiff; but upon full consideration I do not think that it alters the implication necessarily arising upon the provision in the third condition as to the payment of interest upon the balance of the purchase-money, which plainly contemplates that the sale may not be completed upon the 17th of August. The seventh condition may be considered as a saving clause introduced for the benefit of the vendor; but it does not seem to me to show that the bargain was incapable of being kept alive after the 17th of August, and that it might not be carried on for some time longer. There is no direct stipulation that time shall be of the essence of the contract, and the implication is, to my mind, very strong that the parties did not intend it to be so. Upon this short ground I am of opinion that the defendants are entitled to our *judgment. We cannot [350 take into consideration the question of hardship.

LOPES, J.: The only matter for our determination is whether time was of the essence of the contract entered into by the parties; if it was, the plaintiff will succeed; if it was not, the defendants are entitled to judgment. Formerly, in courts of equity, time was not deemed of the essence of the contract, unless it had been made so by express stipulation or necessary implication. This rule now applies in all the divisions of the High Court of Justice. I think that the authorities cited in the course of the argument establish that unless a contrary intention is apparent, upon the sale of a contingent reversionary interest time is to be deemed of the essence of the contract; and therefore *prima facie* the plaintiff is entitled to succeed. But then the last clause of the third condition clearly shows that the parties contemplated that there might be a delay in completing the sale, and that the execution of the necessary documents might be postponed until after the 17th of August. The present case seems to me practically on all fours with *Webb v. Hughes* (*). The only distinction is that in that case the conditions do not appear to have contained the words within brackets occurring in the third condition

(*) Law Rep., 10 Eq., 281.

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set out in the special case before us; but I do not think that they constitute such a difference as to enable us to say that *Webb v. Hughes* (') is not an authority to be followed in the present action. The defendants are entitled to succeed.

Judgment for the defendants.

Plaintiff in person.

Solicitor for defendants: *A. C. Scoles.*

(') Law Rep., 10 Eq., 261.

[2 Common Pleas Division, 351.]

May 2, 1877.

351] *DANIEL, Appellant; JANES, Respondent.

Malicious Injury to Property—24 & 25 Vict. c. 97, s. 41—*Placing Poisoned Flesh in Inclosed Land*—27 & 28 Vict. c. 115, s. 2.

The placing of poisoned flesh in an inclosed garden, for the purpose of destroying a dog which was in the habit of straying there, is not an offence punishable under 24 & 25 Vict. c. 97, s. 41.

But, *semble*, that it is within 27 & 28 Vict. c. 115, s. 2.

CASE stated by a Metropolitan police magistrate under 20 & 21 Vict. c. 43.

The appellant was summoned to the Hammersmith police court to answer a complaint preferred by the respondent under 24 & 25 Vict. c. 97, s. 41, for that he (the appellant) did unlawfully and maliciously kill a dog, the property of the respondent. At the hearing the following facts were proved or admitted:—

The appellant was owner of a garden imperfectly fenced by a quickset hedge in which there were holes large enough to allow a dog to pass through. The respondent's dog strayed in the appellant's garden, by reason of such defects of the appellant's fence. On Monday, the 27th of November last, the appellant told the respondent that, if he did not keep his dog from running into the garden, he should put poisoned meat there. On Friday, the 1st of December, the appellant knowingly, wilfully, and maliciously placed a piece of flesh impregnated with poison on the garden, with the express intention and design of killing the dog. The dog, straying into the appellant's garden by reason of the said defects of the appellant's fence, did eat the poisoned flesh, and was killed thereby.

On behalf of the appellant it was admitted that he had placed poisoned meat in his garden with the intention of killing the dog; and it was contended that he had a legal

right to place it there. The case of *Jordin v. Crump* (1) and the 3d section of the Poisoned Flesh Act (27 & 28 Vict. 115) were quoted by the appellant in support of this contention (1). It was further contended *that the notice [352 given by the appellant to the respondent that, unless he kept the dog from trespassing in the garden, poisoned meat would be placed there, disproved any malicious intent.

The magistrate was of opinion,—1. That, as the case of *Jordin v. Crump* (1) was decided before the passing of the act under which the appellant was charged, it had no application. 2. That 27 & 28 Vict. c. 115, makes the knowingly and wilfully placing of such poisoned meat upon any land unlawful, save as excepted in the act. 3. That, taking into consideration the context and the provision for protecting drains in which poison had been placed by gratings to prevent the entrance of dogs, the appellant's garden so imperfectly fenced as aforesaid was not an "inclosed garden" within the meaning of the exception of the act. 4. He found as a fact that, whether the garden was an "inclosed garden" or not, the poisoned flesh was not placed there "for the destruction of rats, mice, or other small vermin," but knowingly, wilfully, and maliciously, for the express purpose of killing the dog.

He was therefore of opinion that the provisions of the second act did not form any defence, and that the appellant was guilty of unlawfully and maliciously killing the dog; and that the fact that the appellant had given notice to the respondent that, unless he kept the dog from trespassing in the garden, poisoned meat would be placed there, did not disprove his malicious intent. He accordingly convicted the appellant of the offence of unlawfully and maliciously killing the dog.

If the court should be of opinion that, upon the facts above stated, the appellant was lawfully entitled to kill the dog, the conviction was to be quashed; otherwise to remain in force.

Buszard, Q.C., for the appellant: The facts proved and

(1) 8 M. & W., 782; 11 L. J. (Ex.), 74.

(2) 27 & 28 Vict. c. 115, s. 3, "Nothing in this act shall make it unlawful for the occupier of any dwelling house or other building, or the owner of any rick or stack of wheat, barley, oats, beans, peas, tares, seed, or of any cultivated vegetable produce, to put or place, or cause to be put or placed, in any such dwelling house or other building, or in

any inclosed garden attached to such dwelling house, or in the drains connected with any such dwelling house, provided that such drains are so protected with gratings or otherwise as to prevent any dog entering the same, or within such rick or stack, any poison or poisonous ingredient or preparation for the destruction of rats, mice, or other small vermin."

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admitted before the magistrate do not bring the appellant 353] within the terms *of the enactment under which the conviction took place. Sect. 41 of 24 & 25 Vict. c. 97, is a highly penal enactment,—“Whosoever shall unlawfully and maliciously kill, maim, or wound any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement or for any domestic purpose, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labor, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of injury done, such sum of money, not exceeding £20, as to the justice shall seem meet:” and the term of imprisonment is twelve months for a second offence. The words “unlawfully and maliciously,” in that section, are to be construed strictly: the killing there referred to, to warrant a conviction, must be such a killing as in the case of a human being would amount to murder, or at the least to manslaughter, and cannot be referred to a case where the sole object is the protection of a man’s premises and property.

The respondent did not appear.

LORD COLERIDGE, C.J.: The conviction in this case is clearly wrong. I agree with Mr. Buszard that the 41st section of the act upon which the conviction proceeded points to a wicked crime, the unlawfully and maliciously killing or maiming the animals referred to simply for the purpose of indulging a cruel disposition, and not to an act done under an impression, right or wrong, that the party is justified in protecting his premises from a trespass by such means, especially after notice given. The 2d section of 27 & 28 Vict. c. 115, however, is a totally different provision: it enacts that “every person who shall knowingly and wilfully set, lay, put, or place, or cause to be set, laid, put, or placed in or upon any land any flesh or meat which has been mixed with or steeped in or impregnated with poison or any poisonous ingredient so as to render such flesh or meat poisonous and calculated to destroy life, shall, upon a summary conviction thereof, forfeit any sum not exceeding £10, to be recovered in the manner provided by the Poisoned Grain Prohibition Act, 1863” (26 & 27 Vict. c. 113). This latter enactment would seem to show that 354] what was done *here was an unlawful act; but that

question is not now before us. I think the decision of the magistrate must be reversed.

LINDLEY, J.: I am of the same opinion. I cannot come to the conclusion that that which is charged here was an offence within the meaning of s. 41 of 24 & 25 Vict. c. 97.

I am, however, inclined to agree that it was an unlawful act within the provision in the subsequent act.

Conviction quashed.

Solicitor for appellant: *H. J. Liggins.*

One who, by putting strong smelling meats into traps on his lands, and, by trespassing at the time they were injured: *Townsend v. Wathen*, 9 East, 277.

[2 Common Pleas Division, 357.]

May 2, 1877.

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[357

Master and Servant—Negligence—Scope of Employment.

The defendant's carman, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, took out the defendant's horse and cart, and on his way home negligently ran against the plaintiff's cab and damaged it. The course of the employment of the carman was, that, with the defendant's horse and cart, he took out beer to customers of the defendant (a brewer), and in returning to the brewery he called for empty casks wherever they would be likely to be collected, for which he received from the defendant a gratuity of 1d. each. At the time of the accident the carman had with him two casks which he had picked up on his return journey at a public house which his master supplied, and for which he afterwards received the customary 1d.:

Held, that the carman had not re-entered upon his ordinary duties at the time of the accident, and therefore the master was not liable.

APPEAL from the decision of the county court of Yorkshire, holden at Leeds.

This action was originally brought in the Exchequer Division to recover damages for injury done to the plaintiff's cab by the negligent driving of the defendant's servant, and was remitted for trial in the Leeds county court.

At the trial it was proved that on the 5th of March, 1875, the plaintiff's driver, Alfred Wadsworth, was in the course of his employment going in the direction of Roundhay. He was on his near or right side, when, observing the defendant's horse and cart coming rapidly towards him on the wrong side of the road, he called out so as to give warning, and drew up on the foot-path. While in this position, the horse and cart of the defendant came in contact with the plaintiff's cab, and did the injury complained of.

The course of the employment of the defendant's driver

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was that, with the defendant's horse and cart, he took out beer to private customers of the defendant (who is a brewer). and on his return to the defendant's brewery he called for empty casks wherever they would be likely to be collected, for which after delivery at the defendant's brewery he received 1*z.* each from the defendant.

On this particular day, the 5th of March, 1875, the defendant's driver had, without permission, taken the defendant's 358] horse and *cart out of his master's stables for a purpose of his own, viz., to deliver a child's coffin at a relative's house at Roundhay, and, having accomplished his purpose, was returning home to Leeds.

Before the accident happened the defendant's servant had called at a public house which the defendant supplied with beer, to inquire for empty barrels, and having obtained one or two, he continued his journey to his master's brewery. Shortly after this he swerved from his own side of the road, and, proceeding at a rapid pace, drove on to the plaintiff's cab, and did the injury complained of; and the county court judge found from the facts before him that there was no contributory negligence on the part of the plaintiff's servant, and that the defendant had received the casks collected from the servant, and given him the agreed price for such collection. He therefore gave judgment for the plaintiff.

The question for the opinion of the court was, whether upon the above facts the defendant was liable for the negligence of the driver of his horse and cart.

Cyril Dodd, for the defendant: The servant was not at the time of the happening of the accident either expressly or impliedly engaged in his master's business or service. He had taken out the horse and cart for a private purpose of his own, without the knowledge or permission of his master. The true principle is that stated by Cockburn, C.J., in *Storey v. Ashton* (1), "I think, the judgments of Maule and Cresswell, J.J., in *Mitchell v. Crassweller* (2) express the true view of the law, and the view which we ought to abide by. The true rule is, that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as a servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases, it is a question of

(1) Law Rep., 4 Q. B., 476, 479.

(2) 13 C. B., 237; 22 L. J. (C.P.), 100.

degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey *which had [359 nothing at all to do with his employment." *Patten v. Rea* (') has no application: the servant there was acting in a manner sanctioned by his employer. Some stress seems to have been laid by the judge upon the fact of the defendant having paid the servant the customary *ld.* for each cask brought home on the occasion in question. But, apart from the objection that this is relying upon a ratification of a tort, there can be no ratification without a knowledge of all the circumstances.

Hope, for the plaintiff: When the servant originally started, it must be conceded he was not acting in the business of his master. But, at the time the accident happened, he was in the act of performing a part of his ordinary duty.

[LORD COLERIDGE, C.J.: The question submitted to us is, whether upon the facts found the defendant was liable for his servant's negligence. The real question is, was there any evidence to warrant the learned judge in finding that the man was acting in the course of his employment.]

In *Patten v. Rea* ('), Williams, J., says: "It clearly is not necessary in cases of this sort that there should be any *express* request: the jury may imply a request or assent from the general nature of the servant's duty and employment." In the words of Jervis, C.J., in *Mitchell v. Crassweller* ('), to render the master liable, it is enough if the servant was in the master's employ at the time of committing the grievance.

Dodd replied.

LORD COLERIDGE, C.J.: The cases which have arisen upon this subject have from the earliest time been productive of much astute and interesting discussion in courts of law, and eminent judges have differed widely in their decisions. It has always been a matter of extreme difficulty to apply the law to the ever-varying facts and circumstances which present themselves. There is, however, no doubt as to the true principle which ought to guide us. It was laid down in Lord Holt's time, and repeatedly since, that, wherever the master intrusts a horse or carriage, or anything which may readily be made *an implement of mischief, to his [360 servant, to be used by him in furtherance of his master's business, or for the execution of his orders, the master will

(') 2 C. B. (N.S.), 606; 26 L. J. (C.P.), 235.

(') 2 C. B. (N.S.), at p. 614.

(') 13 C. B., at p. 246.

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be responsible for the negligent management of the thing intrusted to the servant, so long as the latter is using it or dealing with it in the ordinary course of his employment. That is undoubtedly a correct statement of the law; and, applying that principle here, the question is whether the act done by the servant in this case which caused damage to the plaintiff, was done by him in the course of his employment by his master, the defendant. My decision in this case depends upon the finding of the county court judge. He finds that "the course of the employment of the defendant's driver was, that, with the defendant's horse and cart, he took out beer to customers of the defendant (who is a brewer), and on his return to the defendant's brewery he called for empty casks wherever they would be likely to be collected, for which after delivery at the defendant's brewery he received 1*d.* each from the defendant." That is a clear and distinct finding as to the scope of the servant's employment. Then, did this accident happen whilst the servant was acting in the course of that employment? Certainly not. He went out with the horse and cart without the knowledge or permission of his master, and not upon his master's business, but for his own private purpose, viz., to deliver a child's coffin at the house of a relative at Roundhay; and, coming home after having accomplished that purpose, he called at a public house which the defendant supplied with beer, and there picked up one or two empty casks, which he brought home to the brewery. The sole question is whether, having started out on a journey for his own purposes in the way described, did the fact that, in returning home, the servant took up some empty casks constitute a re-entering upon his ordinary duties, as the learned judge phrases it; or, in other words, did it convert the journey into a journey made in the ordinary course of his employment, so as to make his master responsible for his negligence? In substance and good sense I think it did not. I cannot, therefore, agree with the conclusion of the learned judge, that, at the time the damage complained of was done, the man was engaged in his master's employment. I think the judgment should be reversed.

361] *LINDLEY, J.: I am of the same opinion. The question submitted for the opinion of the court is, whether upon the facts stated the defendant is liable for the negligence of the driver of his horse and cart. One of the facts upon which that question is based is the statement of the course of the servant's employment, which is, that, "with the defendant's horse and cart, he took out beer to private

customers of the defendant (who is a brewer), and on his return to the defendant's brewery he called for empty casks wherever they would be likely to be collected, for which after delivery at the defendant's brewery he received 1*d.* each from the defendant." The question is whether, upon that distinct statement of the servant's employment, the master is responsible for an accident happening in the manner stated? I think he is not. Treating it either as a question purely of fact or as a mixed question of law and fact, when did the man enter upon the course of his employment? If the accident had happened whilst the servant was returning home not having collected the empties, it is plain that the defendant would not have been liable: the man clearly could not then have been said to have been in his master's employ. Does it alter the case, that, while going back, he picks up a cask or two? The inference I draw from the facts found in the case is, that the servant was engaged, as well on his return as on his outward journey, upon his own private business; and that that journey cannot by the mere fact of the man making a pretence of duty by stopping on his way be converted into a journey made in the course of his employment. I think he could not in any sense be said to be acting in his master's business; and that is the question which the county court judge intended to submit to us. I think he drew an erroneous inference from the facts when he found that the injury was done while the servant was engaged in his master's employment. The defendant is entitled to judgment, with costs.

Judgment for the defendant.

Solicitor for plaintiff: *G. J. Brownlow*, for Keenlyside & Forster, Newcastle-upon-Tyne.

Solicitor for defendant: *John Scott*, for C. J. Garbutt, Newcastle-upon-Tyne.

[2 Common Pleas Division, 369.]

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[IN THE COURT OF APPEAL.]

*PEARSON V. COX and Others.

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Negligence—Sub-Contractor—Evidence—Question for Jury.

The defendants were builders and contractors who after the outside of a house was finished had removed the outer hoarding and had employed a sub-contractor to do the internal plastering. One of the men employed by the sub-contractor, in walking, shook a plank which caused a tool to fall out of a window of the house, and the tool in falling injured the plaintiff who was passing along the highway. The jury found that the hoarding had been properly removed, but that the injury was

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caused by the negligence of the defendants in not providing some other protection for the public:

Held, that the defendants were entitled to judgment, for there was no evidence that the falling of the tool was a probable accident which might reasonably have been foreseen, so as to make it the duty of the defendants to provide against it.

By Lord Coleridge, C.J., and Bramwell, L.J. (Brett, L.J., doubting), that if it was the duty of any one to supply protection against the consequences of the falling of the tool, it was the duty of the sub-contractor and not of the defendants.

Bridges v. North London Ry. Co. (Law Rep., 7 H. L., 213; 9 Eng. R., 165) discussed.

ACTION for damages for an injury caused by the negligence of the defendants.

At the trial before Denman, J., at the Nottingham spring assizes, 1877, it appeared that the defendant Cox was proprietor of certain land and buildings in Market Street, Nottingham. In October, 1876, certain building works were being carried on on the land by the defendants Bradley & Barker, who were the contractors with the defendant Cox for the works. For a considerable time during the progress of the works they were fenced off from the public highway by an outer hoarding or scaffolding. After the outside work was finished, but before the window-sashes were put in, the hoarding was removed by the defendants Bradley & Barker, at the instance of the defendant Cox. The plastering of the interior was then proceeded with by J. Smith, a plasterer, under a sub-contract with Bradley & Barker. On the 13th of October a tool called a "straightedge" was standing against a plank near one of the windows, and one of Smith's workmen in walking along caused the plank to spring, and so threw down the straightedge, which fell out of the window and injured the plaintiff, who was passing along the public foot-path.

370] *In answer to questions by the learned judge, the jury found, 1. That the defendants did not fail to keep up the hoarding so long as the public safety required its continuance. 2. That the injury to the plaintiff was not caused by such failure. 3. That it was caused by the negligence of the defendants Bradley & Barker in not providing some other protection for the public; and they assessed the damages at £200.

Judgment having been entered for the defendants, the plaintiff moved before the Court of Appeal to set aside that judgment as far as Bradley & Barker were concerned, and to enter judgment for the plaintiff.

Buszard, Q.C., and *Lumley*, for the plaintiff: It was admitted that the building was in the hands of these defendants, and the jury have found that they were negligent in not providing sufficient protection against accidents like that which occurred to the plaintiff. Whether they are the

persons responsible for such an accident is a question, not of law, but of fact: *Sadler v. Henlock* ⁽¹⁾.

Mellor, Q.C., and *Stanger*, for the defendants: The real dispute was whether the hoarding ought to have been removed, and it was not suggested that it was the duty of the builders to guard the windows.

[They were then stopped.]

LORD COLERIDGE, C.J.: I am of opinion that this judgment ought to be affirmed. The building was, up to a certain time, protected by a hoarding, which was then removed, and the jury have found that further protection by the hoarding was unnecessary, therefore nothing turns on its removal. There remained, however, certain internal work to be done by the sub-contractor, and his man put a tool called a straightedge against some planks which were afterwards shaken, and this caused the straightedge to fall out of the window and hurt the plaintiff. The plaintiff has brought an action against the builders of the house, and not against the plasterer, whose servant was using the straightedge. In my opinion such an action cannot be maintained. The case against these defendants was put upon two grounds: first, that *the falling of the [371] straightedge was a thing for which they were personally responsible; but it was virtually admitted that the accident did not happen by the negligence of any person for whom the defendants were responsible. Secondly, that there was a general duty imposed upon these defendants to guard against accidents; but that must mean accidents which could reasonably be foreseen, and there was no evidence that this was such an accident. No doubt the accident has happened, and may happen again, but the falling of a tool in this manner is not such a probable incident in the plastering of the interior of a house as that it could reasonably have been foreseen. If it was so, that would be a ground for holding some one liable; but if any one is liable for not providing some protection, it would be the sub-contractor. On neither ground do I think that any liability was cast upon these defendants, and I think that the judgment ought to stand.

BRAMWELL, L.J.: I am of the same opinion, and for the same reasons. The only ground on which the action could be maintained against the defendants would be that the carrying on of the work in the course of which the accident happened was a nuisance to the highway, unless the passers by were guarded against the results. It may be that when a house is being built there is a probability that tools or

⁽¹⁾ 4 E. & B., 570; 24 L. J. (Q.B.), 138.

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other things will fall, and the jury might be justified, either upon the evidence of experts or from knowledge of common life, and without experts being called, in finding that some protection to the public must be afforded. The question should be left to the jury, and I do not stop to consider exactly what the protection ought to be, whether a hoarding must be erected, or whether it would be sufficient that some one should be placed there to warn persons off. I will assume that there ought to be a hoarding, and in most towns there is a statutory provision requiring a hoarding; then it would be right to put up a hoarding, as otherwise there would be a nuisance; *Barnes v. Ward* ⁽¹⁾ and *Hardcastle v. South Yorkshire Ry. Co.* ⁽²⁾ are authorities for this, and the builder might well, under these circumstances, be bound to put up a hoarding. But it was said that there was no occasion for a hoarding after the outside of the house had 372] *been finished, and the jury have found to that effect. Then, was there any other duty cast upon the defendants? First, is there any duty with respect to the plastering? Are we to hold, as a matter of law, that plastering rooms involves such presumable danger to the passers by that unless some protection is afforded it is a nuisance to the public highway, or are we to leave that question to the jury? I could not hold it to be so as a matter of law, and if the question ought to have been left to the jury, at all events there ought to have been evidence of experts that such plastering was dangerous to the passers by. But be that as it may, I doubt if any such question ought to have been left to the jury. The jury, however, have found something to that effect. They appear to say that owing to the defendants not having provided against the accident, the accident happened. Therefore the jury thought that it ought to have been provided against, though I have great doubt whether there was any evidence on that point, and whether the judge ought to have left it to the jury.

But however that may be, if there was any such duty, it was the duty of the person whose conduct was a nuisance to the highway. I agree that the general builder would be the person who is to guard against general dangers in the course of the building, but this, according to the opinion of the jury, is not such an accident. But even if I assume danger to the public from plastering, I cannot understand upon what ground the defendants are to be made liable. The plasterer, if any person, ought to be made liable; it is he who knows when he is going to begin, and when he is going

(1) 9 C. B., 392; 19 L. J. (C.P.), 195.

(2) 4 H. & N., 67; 28 L. J. (Ex.), 139.

to leave off, and how the work will be done; and he is the person who ought to provide against the accident. Going, therefore, as far as I can, and assuming that some one ought to have provided against the danger, the last link in the chain fails: it is the plasterer who ought to have provided against it, and not these defendants.

BRETT, L.J.: I am of opinion that the judgment is right, because the jury found that there was no negligence in not keeping up the hoarding, and there was no evidence of any other negligence to be left to the jury. If it could be shown that the tool was dropped through the negligence of the workman, I *think that the person liable would be [373 the master of that workman, that is to say, the plasterer or sub-contractor, and that for such negligence these defendants would not be liable. If these defendants were liable, it would be for some other sort of negligence, and not for merely allowing a tool to fall. The negligence alleged was that the hoarding ought to have been kept up or that there ought to have been some protection at the window, but there was no evidence that the tool fell by the negligence of any one—no such question was left to the jury. It seems to have been assumed that the falling of this tool was the result of accident. If there had been any evidence that such an accident might probably happen whilst such work was going on in the interior of a house, then there might have been a question for the jury whether some one ought not to have guarded the public against such an accident. If there had been such evidence, then, with all deference to what has been said, I should have thought it a question whether the builders were not the persons who ought to have put up that protection to the public, as they had control over the whole building. But there was no evidence that any such accident was probable, and no one said it was probable that such things would fall from the window; nor is it a thing the probability of which must be known to all the world, so that the jury must be taken to know it without any evidence. The accident was highly improbable, and a man need not guard against highly improbable accidents.

With respect to the opinion I expressed in *Bridges v. North London Ry. Co.* (1), having again considered what I then said, I see nothing wrong in it, and I continue to hold the same opinion. But I did not say that there is not always a preliminary question for the judge to decide, namely, whether there is any evidence to go to the jury. On the contrary, I asserted it, and in my answer to the House

(1) Law Rep., 7 H. L., 213.

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of Lords I laid it down that there is a question for the judge to decide. I said ('): "Such is the direction to the jury, but before giving this direction it is the duty of the judge to determine whether there is evidence fit to be left to the jury on each of the propositions which it is necessary that the plaintiff should establish." Nothing can be more distinct [374] than that, as showing that *there is still a question of law whether there is any evidence, and I endeavored to lay down what was the rule to guide the judge. He must ask himself whether the facts in evidence, if unanswered, would justify a man of ordinary reason and fairness in answering the question in the affirmative. I saw the difficulty, and I went on to say ('), "It may be said that this is so indefinite as to amount to no rule." I answered this by saying that I could not think so, and speaking of the verdict I said that though it might often happen that the verdict was not one which the judges would have given, yet they might not be able to say that reasonable and fair men might not have come to that conclusion, and therefore they would not be justified in setting it aside; and I thought that this rule would govern the judge in determining the preliminary question. It seems to me that there is always a question whether there is evidence or not; and in this case, if there had been some evidence upon which reasonable and fair men might find that the accident was one which might probably happen, the judge might have left it to the jury. But when there is no evidence that the accident is one which would probably happen, then if the jury were to find that any one was bound to guard against a wholly improbable accident, that is not a conclusion which reasonable men would come to. There was no such evidence, and I hold that these defendants are entitled to judgment.

Judgment for the defendants.

Solicitors for plaintiff: *Johnson & Weatherall*, for Burton & Co., Nottingham.

Solicitors for defendants: *Taylor, Hoare & Co.*, for Hunt & Williams, Nottingham.

(') Law Rep., 7 H. L., at p. 232.

(') Law Rep., 7 H. L., at p. 233.

See 17 Eng. Rep., 800 note; Id., 880 note; 20 Eng. Rep., 343 note.

A party wall is a wall between two estates which is used for the common benefit of both.

Where A., under license from B., built a wall upon a line dividing the estates of the parties, upon a written stipulation to the effect that, upon building a house against the wall and

paying to A. one half of its cost, B. should have the right to use the same as a party wall, held that, until this condition was fulfilled, the wall was not a party wall, but the property of A., and that where the wall, through the negligence of A., fell and injured B.'s property, A. was liable for the damages: *Glover v. Mersman*, 4 Mo. App. Rep., 90.

See also *McCourt v. McCabe*, 1 Wisc. Leg. News, 247.

Where the foundation of a wall is partly on plaintiff's and partly on the adjoining land, although the wall after it rises is *all* on defendant's land, still it will be considered a party wall, and subject to the rules concerning party walls: *Gordon v. Milne*, 10 Philadelphia Rep., 15, affirmed 81 Penn. St. R., 54, 20 Eng. R., 344 note.

A. erected a wall partly on his own lot and partly on the adjoining lot, which he subsequently purchased; he afterwards sold the built-up lot, reserving the half of the party wall on the vacant lot. He afterwards sold the vacant lot to another person, and subsequently repurchased the built-up lot: Held, that the wall continued to be a party wall as between the owners of the two lots: *Beaver v. Nutter*, 10 Phila. Rep., 345.

The word "license" in the statute relative to excavations imports leave, permission, sufferance, authorization. It implies only the removal of legal restraint by a grant of permission. The necessary license is granted when it expressly authorizes such acts to be done as may be necessary to enable the person to whom it may be given, to perform the duty which the statute in such a contingency creates: *Sun, etc., Association v. Tribune Association*, 44 N. Y. Supr. Ct. R., 136; *Sherwood v. Seaman*, 3 Bosw., 127.

Under the act to regulate party walls (Rev. p. 809), if the party about to make excavations, more than eight feet deep, agrees with the owner of the wall that the latter shall direct and pay for the work of supporting the wall on the former's account, this agreement takes the place of the licenserequired in the act, and the money paid for such work may be recovered back: *Hamilton v. Mullory*, 2 N. J. L. Jour., 87.

Where the owner of a vacant lot, in the city of New Orleans, who desires to erect a building of certain dimensions on the lot, finds that the wall of his neighbor's house, which is built up to the boundary line of the lot, is so thin that the weight of his prospective building, although erected within the bounds of his own lot, would destroy his neighbor's house, he has the legal right to take down the neighboring wall, and replace it by one strong

enough to support the building he shall erect. Such reasonable care must be observed by him, however, as will render the inconvenience and loss to his neighbor as small as practicable; and his care must be proportioned to the risk of loss and inconvenience to his neighbor that his undertaking may occasion; and he is liable for whatever actual damage his neglect to take such care may entail.

A party cannot be held liable for the value of property, stolen on account of its being exposed to theft by an act of his which he had the legal right to do: *Gettworth v. Hedden*, 30 La. Ann., 30.

Under a contract between two owners of adjacent lots in a city, by which one who is about to rebuild on his lot, undertakes to build a foundation partly on his land and partly on the land of the other, and wait, upon the latter, for repayment for the part on his land until he "rebuilds his house and uses said one foot of said foundation, or until he sells the lot," an action cannot be sustained by the former or his personal representatives against the latter, until he does actually rebuild or sell; and the extension of the frame house then standing on the lot, and which was rested on the foundation wall when completed, a few feet to the pavement in front would not be a rebuilding within the meaning of the contract: *Elliston v. Morrison*, 3 Tenn. Chy., 280.

Without contract, or some relation of privity regarding the use to be made of land sold, the vendee stands to his vendor just as he does to others, and the maxim applies, *Sic utere tuo ut alienum non laedas*.

A. sold to B. coal underlying certain lands, and, B. having begun the manufacture of coke therefrom, A. sold a portion of the surface to C. C. sold a part of his surface to D., and a firm in which D. and B. were partners afterwards built coke ovens thereupon, and began to make coke. In an action by C. against B. to recover damages for injuries caused by mining the coal and manufacturing coke: Held (affirming the judgment of the court below), that C., standing in no relation of contract or privity to justify these injuries, was entitled to recover.

A person whose land has been injured by the negligent mining of coal beneath it, or whose crops have been

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injured by heat and smoke from coke ovens, is entitled to recover such damages as the jury finds from the evidence he has sustained: *Brown et al. v. Torrence*, 6 Weekly Notes of Cases (Penn.), 280.

[2 Common Pleas Division, 375.]

April 19, 1877.

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*ALLKINS and Others v. JUPE.

Marine Insurance—Profit—Commission—Illegal Policy—“Ship ^{and} or Ships, Steamer ^{and} or Steamers”—“Without Benefit of Salvage, but to pay Loss on such Part as shall not arrive”—19 Geo. 2, c. 37, s. 1.

A policy containing any of the words forbidden by 19 Geo. 2, c. 37, s. 1, is illegal, if the insurance relates simply to “ship ^{and} or ships, steamer ^{and} or steamers,” and does not exclude British vessels.

The plaintiffs effected a policy upon commission and profit upon “ship ^{and} or ships, steamer ^{and} or steamers,” and the following clause was inserted: “Warranted free from all average and without benefit of salvage, but to pay loss on such part as shall not arrive.” The defendant was an underwriter of the policy. The goods to which the commission and profit insured related were shipped on board a British vessel, which was lost by the perils of the seas. The plaintiffs having sued to recover the amount of the defendant's subscription, or, if the policy were void, the premium paid by them:

Held, that the policy was rendered illegal by 19 Geo. 2, c. 37, s. 1, for the insurance was “without benefit of salvage,” and the terms of the policy did not exclude British ships.

Per Grove, J., that the prohibition of the statute extends to policies on profit and commission:

Per Lindly, J., that the prohibition of the statute extends to policies on profit, and that the policy sued on, being illegal as to profit, was likewise illegal as to commission:

Semble, per Lindley, J., that the prohibition of the statute extends to policies on commission:

Held, further, that the illegality was so far the fault of the plaintiffs that they could not recover back the premium.

SPECIAL CASE stated in an action on two policies of marine insurance. The following are the material facts:—

The plaintiffs were brokers and commission agents carrying on business in London. Their business consisted principally in buying and selling shellac of various qualities and descriptions for account of their principals. Such shellac was largely bought and sold under contracts, the terms of which were expressed in printed forms of bought and sold notes used by the plaintiffs. These notes, after describing the shellac, proceeded as follows: “To be shipped . . . by sailing vessel or steamers; should the vessel or vessels applying to this contract be lost before or after declaration, this contract to be cancelled so far as regards such vessel or vessels on production of the bill or bills 376] of lading as soon as practicable after *the loss is ascertained; ship or ship's name to be declared as soon as known to sellers; should the shellac or any portion

thereof be transferred to any other vessel or vessels and arrive, this contract to hold good." When making such contracts the plaintiffs did not disclose the names of their principals on either side, and they were by the custom of the trade entitled to sue and liable to be sued as principals on such contracts. A brokerage of one and a half per cent. on the price was payable to the brokers according to the custom, of which one per cent. was paid to them by the seller and one half per cent. by the buyer. The brokerage was payable upon the completion of the transaction, and was not payable in case the contract was cancelled in pursuance of the provision contained in the contract. The plaintiffs used to receive instructions from many of the persons buying through them to effect insurances for the benefit of such buyers on the profits expected on the shellac bought under such contracts, and prior to the making of the policies herein mentioned the plaintiffs had had such instructions from various persons. They had been in the habit also of insuring their own commission as brokers on the contracts effected through them. On or about the 12th of January, 1874, the plaintiffs procured a policy to the amount of £1,000. The policy, which was in the ordinary form, was effected by the plaintiffs in their own name, on a voyage from Calcutta to London *via* the Cape or Suez Canal, "on ship ^{and}/_{or} ships, steamer ^{and}/_{or} steamers," at the rate of £1 10s. per cent., "to return 9s. 6d. per cent. for interest by steamers on this policy;" the insurance was declared to be "on commission ^{and}/_{or} profit," and the policy contained the following clause: "Warranted free from all average and without benefit of salvage, but to pay loss on such part as shall not arrive." The policy was underwritten by the defendant for the sum of £100. On the 6th of March, 1874, the plaintiffs effected another policy for the sum of £1,000; it was similar to that of the 12th of January, except that it did not contain the words "to return 9s. 6d. per cent. for interest by steamers on this policy." This policy was also underwritten by the defendant for the sum of £100. The words "without benefit of salvage" were inserted in the policies by the insurance brokers without any instructions from the *plaintiff; [377 a clause of this kind was a stereotyped form usually inserted by insurance brokers in policies on commission and profits. The premiums were duly paid by the plaintiffs. In the month of January, 1874, the plaintiffs, acting as brokers, sold and resold certain cases of shellac: and on the 2d of February the vendors declared that the shellac would arrive

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by the Woosung. On the 12th of February the plaintiffs declared an interest on the policy of the 12th of January, 1874, to the extent of £120 on the Woosung. This declaration of interest was intended to cover the profits and commissions on the sale and resale of the shellac above mentioned. The Woosung was a British vessel, and sailed on the voyage insured with the shellac on board; she was wrecked in the Red Sea on the 20th of February, 1874, and became an actual total loss. A portion of her cargo was saved: some of the shellac shipped in her reached London in a greatly damaged state; it did not come in cases but in bags of lumps and was a mass of matter mixed up with indigo, linseed, rapeseed, and jute. It was incapable of identification, and was brought to London in eight vessels. The total quantity of shellac on board the Woosung at the time she was lost was 750 cases; of this only one-tenth arrived, and in the condition above mentioned. The shellac that did arrive was subject to a heavy claim for salvage; none of it was tendered to the plaintiffs: on the contrary, the vendors gave notice that the contracts were void by reason of the loss of the Woosung. It was afterwards sold for the benefit of Lloyd's Salvage Association, and the proceeds were distributed amongst the underwriters on the cargo of the Woosung. The plaintiffs also sold and resold other cases of shellac, and the vendors declared they would arrive by the Queen Elizabeth; the plaintiffs declared on the policy of the 6th of March interest in the Queen Elizabeth to the extent of £300. The declaration was intended to cover profits and commissions upon some of the shellac shipped on board the Queen Elizabeth. She was a British vessel, and sailed on the voyage insured, but was lost by the perils of the seas, being wrecked on the Tariffa Rocks. The cargo was submerged, and got out by divers; it was then taken to Gibraltar, and there shipped on board various vessels and brought to London. On the arrival of the shellac, none of it was tendered to the plaintiffs by the vendors; they gave 378] notice to the plaintiffs that the contracts were void owing to the loss of the Queen Elizabeth. All the above cases of shellac that were delivered in London arrived in a very damaged state; it was mixed up with indigo and saturated with sea water.

The questions for the opinion of the court (which was to have power to draw inferences of fact) were, first, whether the policies dated the 12th of January and the 6th of March were null and void by reason of the statute 19 Geo. 2, c. 37, or whether they were good either as regards the commis-

sions or the profits, or both; secondly, whether, if the policies were null and void, the plaintiffs were entitled to recover the premium paid, or any part thereof (').

April 16, 19. *Benjamin*, Q.C. (*Channell* with him), for the plaintiffs: As the policies sued on contain the words "without benefit of salvage," it is necessary to determine whether they are rendered illegal by 19 Geo. 2, c. 37, s. 1 ('). It has been held *in *Smith v. Reynolds* (') and *De Mattos v. North* (') that this statute does extend to policies upon profits, although they are not expressly included in it; but *Thellusson v. Fletcher* (') which was approved of in *Andree v. Fletcher* ('), decided that foreign ships are not within the prohibition of the 1st section of 19 Geo. 2, c. 37. In the present case the insurance is upon "ship ^{and} _{or} ships, steamer ^{and} _{or} steamers," and therefore its terms might have been complied with by shipping all the shellac on board foreign vessels; in that event the statute would not have been contravened; and the mere possibility, or even probability, of the goods being shipped in British vessels was insufficient to make the contract void at the time when it was entered into; and if it was valid in its inception, it could not be rendered illegal by something which afterwards happened.

The statute 19 Geo. 2, c. 37, did not intend to render illegal in every instance policies containing the words forbidden by the 1st section. A policy is avoided only when

(¹) Other questions were stated for the opinion of the court, but as the judgment proceeded entirely on the ground of illegality, it is unnecessary to mention them.

(²) 19 Geo. 2, c. 37, is intitled "An act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandises or effects laden thereon."

The preamble recites that "it hath been found by experience that the making assurances interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy in time of war; and such assurances have encouraged the exportation of wool, and the carrying on many other prohibited and clandestine trades, which by means of such assurances have been concealed and the parties concerned secured from loss, as well to the diminution of the public revenue as to the great detriment of fair traders,

and by introducing a mischievous kind of gaming or wagering under the pretence of assuring the risk on shipping, and fair trade, the institution and laudable design of making assurances hath been perverted, and that which was intended for the encouragement of trade and navigation has in many instances become hurtful of and destructive to the same."

By s. 1: "No assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to His Majesty or any of his subjects, or on any goods, merchandises, or effects laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and every such assurance shall be null and void to all intents and purposes."

(³) 1 H. & N., 221; 25 L. J. (Ex.), 337.

(⁴) Law Rep., 3 (Ex.), 185.

(⁵) 1 Doug., 815.

(⁶) 2 T. R., 161, at p. 164.

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those words have some operation; in the present case it is clear that the underwriters were to get what is equivalent to the benefit of salvage, for it is provided that they were "to pay loss on such part as shall not arrive;" and it follows from this that they were not to pay in respect of the profit upon such goods as should arrive: therefore the underwriters would obtain the benefit of any profit arising from the sale of goods, which after a total loss might be salvaged and arrive at the port of destination. Consequently, the words "without benefit of salvage" are insensible and unmeaning, and may be rejected as surplusage. But, further, it can be asserted that in the true sense of the term profits do not admit of salvage, for if the goods are lost or injured they cannot be sold at a profit; the statute only prohibits the use of the words mentioned in the 1st section in a policy upon things which are capable of salvage: *Lucena v. Craufurd* (*). As this case was not alluded to in either 380] *Smith v. Reynolds* (*) or *De Mattos v. North* (*), *these decisions do not carry the weight which they otherwise might deserve; for if *Lucena v. Craufurd* (*) had been brought before the attention of the Court of Exchequer, the result might have been different. It is true that during the argument in *Mortimer v. Broadwood* (*) reference was made to *Lucena v. Craufurd* (*), but the Court of Common Pleas felt itself bound by the authority of *Smith v. Reynolds* (*) and *De Mattos v. North* (*). Nothing passes by the abandonment of profits, 2 Parsons on Marine Insurance, ch. 4, s. 5, p. 170; and on this ground it has been laid down that no notice of abandonment is required in a policy upon profits, 2 Phillips on Insurance, 5th ed., ch. 17, s. 1, p. 235, par. 1503; for it is a rule of law as to marine insurance, that where there can be nothing to abandon no notice of abandonment is necessary: *Rankin v. Potter* (*). It follows that there can be no salvage of profits. An insurance upon commissions must be governed by the same rules and principles as an insurance upon profits, and if the policies sued on are valid as to profits, they are likewise valid as to commissions; there can be no abandonment to the underwriters of a policy upon commissions, at least as to those commissions which have not been earned, 2 Phillips on Insurance, 5th ed., ch. 17, s. 1, p. 236, par. 1504; and therefore there can be no salvage of them.

But, at all events, the plaintiffs are entitled to recover

(1) 2 B. & P. (N.R.), 269, at p. 311.

(*) 20 L. T. (N.S.), 398; 17 W. R., 653.

(*) 1 H. & N., 221; 25 L. J. (Ex.), 337.

(*) Law Rep., 6 H. L., 83.

(*) Law Rep., 3 Ex., 185.

back the premiums, for the shellac might have been shipped on board foreign vessels. No doubt where a policy is illegal in its inception the whole transaction is void and the premium cannot be recovered back, *Andree v. Fletcher* ⁽¹⁾; but in the present case, if the adventure is illegal, it is rendered so by collateral matter happening after the insurance was effected.

Cohen, Q.C. (*G. Bruce* with him), for the defendant: The insurance is rendered void by virtue of 19 Geo. 2, c. 37, for the policy includes British as well as foreign ships. The history of wagering policies is given in 1 Arnould on Marine Insurance, 4th ed., part 1, ch. 3, p. 111; and the result may be taken to be, that by enacting *the foregoing statute [38] the Legislature has declared that no insurance shall be valid which confers upon the assured a right to more than an indemnity. The prohibition of the statute cannot be avoided even by inserting a provision which in effect gives the assurer benefit of salvage. The plaintiffs' counsel have relied upon the words "to pay loss on such part as shall not arrive," and have contended that, owing to the use of them, the underwriters do get the benefit of salvage; but these words really impose an additional burthen upon the underwriters, for if they were not inserted the underwriters would only have to pay in the event of a total loss, the policy being warranted free from average, *Ralli v. Janson* ⁽²⁾; but these words make them liable for a partial loss. It has been clearly established that 19 Geo. 2, c. 37, extends to profits, *Smith v. Reynolds* ⁽³⁾; *De Mattos v. North* ⁽⁴⁾; *Mortimer v. Broadwood* ⁽⁵⁾; and these decisions must be accepted as binding until they are overruled in a court of appeal. Then there may be a salvage of profits. Suppose a ship sinks in shallow water and her cargo is afterwards recovered in an uninjured condition; or that she is derelict and is afterwards rescued and brought to her port of destination; or that she is captured by a enemy and is afterwards recaptured; in each of these cases, after payment by the underwriters, if the goods arrive and are sold at a profit, there will be salvage of profits. Again, suppose that a vessel is disabled by a storm and driven into a port of refuge, and that her cargo is found to be so much injured by water that it cannot be transhipped and forwarded to the port of destination except at a loss: here there is *prima facie* a total loss of profit, and the underwriter is liable to

⁽¹⁾ 3 T. R., 266.

⁽²⁾ 6 E. & B., 422; 25 L. J. (Q.B.), 300.

⁽³⁾ 1 H. & N., 221; 25 L. J. (Ex.), 337.

⁽⁴⁾ Law Rep., 3 Ex., 185.

⁽⁵⁾ 20 L. T. (N.S.), 398; 17 W. R., 653.

pay ; but suppose that afterwards the cargo, in its damaged condition, is sold at the port of refuge at a great profit upon its original cost, owing to a sudden demand for the goods of which it is composed : here, again, there will be a salvage of profits. But upon a policy in the form of those sued on, the underwriters will be deprived of the benefit of it. This shows that the policy is rendered void by 19 Geo. 2, c. 37. For similar reasons the policies are void as regards commission.

[382] *Then the premium cannot be recovered back, for it was paid in respect of an illegal insurance, and the risk had ended before this action was brought: 2 Arnould on Marine Insurance, 4th ed., part 3, ch. 9, p. 991. The plaintiffs are in a dilemma ; for either the contract was in its inception illegal, or if it was originally lawful it has been rendered illegal by the act of the plaintiffs in causing the goods to be shipped on board British vessels ; in neither case can they succeed (').

Channell, in reply: The effect of the words "warranted free from average . . . but to pay loss on such part as shall not arrive," is to make underwriters liable for such cases of shellac as shall never arrive at all, but not for those which arrive in a damaged condition ; the underwriters therefore in effect have the benefit of salvage. The words of the policy are to be construed according to their actual meaning as used therein ; and when it is clear, from other parts, that a clause is not used in its ordinary sense, it ought to be struck out and rejected as surplusage ; therefore the expression "without benefit of salvage" may be left out of consideration.

GROVE, J.: We are of opinion that the defendant is entitled to the judgment of the court ; and we think it better to deliver our opinions at once, our minds being fully made up as to the question of illegality.

It is sufficient to refer to the policy dated the 12th of Jan-

(') Cohen, Q.C., also contended that the plaintiffs could recover only in respect of those goods which had not arrived in any shape and could not recover in respect of those which had arrived in a damaged condition, although they might be incapable of identification, citing *Spence v. Union Marine Insurance Co.* (Law Rep., 3 C. P., 427) ; that the plaintiffs could recover only for profits and commissions upon goods which had been sold pursuant to a binding contract, citing *Stockdale v. Dunlop* (6 M. & W., 224) ; *McSwiney v. Royal Exchange As-*

urance (14 Q. B., 634 ; 18 L. J. (Q.B.), 193 ; in Ex. Ch., 14 Q. B., 646 ; 19 L. J. (Q.B.), 222) ; that the plaintiffs could not recover owing to the form of the policies sued on as applied to the subject-matter of insurance, citing *Bell v. Ausley* (16 East, 141) ; *Watson v. Scann* (11 C. B., (N.S.), 756 ; 31 L. J. (C.P.), 210) ; *Ehworth v. Alliance Marine Insurance Co.* (Law Rep., 8 C. P., 596). But as the judgment of the court proceeded entirely upon the ground that the policies were rendered illegal by 19 Geo. 2, c. 37, s. 1, these parts of the argument are omitted.

uary, 1874, the other policy sued on being substantially the same, and *it is only necessary to observe that the [383 insurance is upon "commission ^{and} profit" upon goods to be put on board any ship or steamer, whether British or foreign, and, I may add, under the care of any master: and the following clause is inserted: "Warranted free from all average and without benefit of salvage, but to pay loss on such part as shall not arrive." These are the material parts of the policy, and before commenting upon them I will refer to the provisions of the statute relied upon by the defendant. It is 19 Geo. 2, c. 37, and from the terms of the title it appears to have been the intention of the Legislature to regulate insurances upon British ships and their cargoes: the title of a statute is perhaps not to be deemed part of it, but it may sometimes be useful as a guide to its meaning. The preamble recites the different kinds of mischief which it was intended to check; but I need not read it, for its terms are well known to those who are familiar with the law of marine insurance. Then the first section provides that no insurance shall be made "on any ship or ships belonging to His Majesty or any of his subjects, or on any goods, merchandises, or effects laden or to be laden on board of any such ship or ships . . . without benefit of salvage to the assurer." The policy before us contains the words "without benefit of salvage," and omits the words "to the assurer;" but I think that the meaning is clear when we look at the next clause "to pay loss upon such part as shall not arrive:" the persons to pay are not expressly mentioned, but obviously they are the underwriters; and therefore, according to the ordinary rules of grammatical construction, it is the insurers who are not to have benefit of salvage, and the words read in full would run thus: "without benefit of salvage to the insurers, but they are to pay loss on such part as shall not arrive."

It has been urged on behalf of the plaintiffs that, as the statute which I have mentioned applies only to British ships, the policy sued on is not within its prohibition, for the commission and profits intended to be thereby insured might relate to goods shipped on board foreign vessels only. But I cannot assent to this argument; the policy contemplates a shipment upon either British or foreign vessels, and to my mind it is clear that it was intended by the parties to the insurance to bring to England the goods to which it related by vessels of any nationality. I think that the emphatic *words of the statute are too strong to be [384 got over, and that it was intended to render void any policy

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containing the forbidden words and relating to any probable or even possible loading of goods upon board a British vessel. In order that such a policy as this may escape the operation of the statute, cargoes on board British ships must be expressly excluded from the insurance. But even if I thought the form of the policy not to be illegal, I should agree with the argument advanced by the defendant's counsel that the insurance would become unlawful so soon as the goods were shipped on board a British vessel.

It is to be observed that 19 Geo. 2, c. 37, mentions ships and "goods, merchandises, or effects," but does not allude in express terms to profits; but as to this I think we are bound by authority. The cases cited during the argument, *Smith v. Reynolds* (1), *De Mattos v. North* (2), and *Mortimer v. Broadwood* (3), decide that a policy upon profits "without benefit of salvage" is within the prohibition of the statute. The counsel for the plaintiffs referred to *Lucena v. Craufurd* (4), and relied upon the almost unanimous opinion of the judges delivered in the House of Lords as showing that the statute intended to forbid the use of the words "without benefit of salvage" only when the insurance related to some matter capable of salvage (p. 311). And it was suggested that the decisions in *Smith v. Reynolds* (1) and *De Mattos v. North* (2) were hardly consistent with the reason of this opinion, and further, that as no allusion was made in either of them to *Lucena v. Craufurd* (4) they were of little authority, and would have been differently decided if the attention of the judges had been drawn to *Lucena v. Craufurd* (4). I do not think that we can assent to this suggestion; unless there be some very strong reason to the contrary, we must accept as sound the decisions of courts of co-ordinate jurisdiction, especially when they have been pronounced some time ago, and ever since have, so far as we are aware, been acted upon and treated as binding authorities. And at all events the remark does not apply to *Mortimer v. Broadwood* (3), because there *Lucena v. Craufurd* (4) was brought under the notice of the court.

385] *It was also contended on behalf of the plaintiff that the words "without benefit of salvage" are so qualified by those which immediately follow, "but to pay loss on such part as shall not arrive," that they do not fall within the prohibition of the statute, and are in fact redundant and unmeaning. It was argued that upon the true construction

(1) 1 H. & N., 221; 25 L. J. (Ex.), 337.

(2) Law Rep., 3 Ex., 185.

(3) 20 L. T. (N.S.), 398; 17 W. R., 653.

(4) 2 B. & P. (N.R.), 269.

of the policy the assured would not receive more than an indemnity, and could not at once get salvage and payment from the underwriters. This appeared at first sight a captivating argument, and it was urged that the court ought not to be astute to support a defence by which an underwriter upon technical grounds seeks to escape from a liability which he has undertaken to meet. As to this latter argument, I reply that we have nothing to do with questions of hardship: if the law is in fault it must be altered by the Legislature, our only duty is to apply it to the facts before us. I will assume for the moment that the words in this policy "without benefit of salvage" are inoperative, and that in no instance could the plaintiffs obtain more than an indemnity; even in that case I think we could not have given judgment for the plaintiffs; whenever a statute is free from ambiguity, it is contrary to the duty of judges in effect to repeal it by exercising their own judgment as to whether a particular state of facts falls within the mischief aimed at by the Legislature; when a statute is difficult to be interpreted, it may be proper, in order to ascertain its meaning, to consider what was the object of the Legislature in passing it; or where an enactment construed in one sense, although that be the ordinary grammatical sense of the words, leads to a manifest absurdity, then the whole of the statute may be looked at, and courts of justice may interpret the apparently unmeaning enactment in such a manner as to render it consistent with what may be fairly presumed to be the intention of the Legislature. But the statute before us is plain and definite in its terms, and it is not for us to speculate whether the Legislature might not have advantageously introduced an exception in favor of policies where from the nature of the subject-matter of insurance no salvage is possible. And further, the forbidden words may have been so injurious and mischievous in their operation that it was in the opinion of the Legislature the safest course to prevent the use of them *altogether; and it would [386 be dangerous not to put in force the statute, because in a particular state of facts it might be difficult to see how the presumable intention of Parliament has been violated. There may be frauds and deceits in matters of insurance which my experience as a judge may not enable me to detect, and if we were to decline to act upon this statute because we may be unable to see what mischief contemplated by the Legislature would result from holding this policy to be legal, we might afterwards find out that words such as these permit evils which are not for the moment present to our

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minds. Therefore, even if this policy did not seem to us capable of giving more than an indemnity to the assured, it would be dangerous for us to hold that the plaintiffs could recover.

But it is unnecessary to rest our judgment upon this ground, for in the present case the subject-matter of insurance may in some instances admit of salvage. I will first consider the policy as if it were simply upon goods. The material clause is, "Warranted free from all average and without benefit of salvage, but to pay loss on such part as shall not arrive." The argument before us has not made very clear what is the real meaning of the latter part of the clause, it being coupled with the words "warranted free from all average." As a general rule, when a marine policy contains a warranty against average, the underwriter is liable to pay only when there has been a total loss either actual or constructive, and if there be any salvage he takes the benefit of it in diminution of the amount claimed from him by the assured. But the policy before us contains the additional words "without benefit of salvage" to the insurer, as I read it; and if a total loss happens, and there is any salvage, the assured would get the full sum secured by the policy and also the salvage, and therefore would obtain more than an indemnity. Then follow the words "but to pay loss on such part as shall not arrive." In the first place, it is clear from these words that the underwriters must pay the sum assured upon those goods which never arrive at the port of destination; and I think it also clear that they are not bound to pay upon such part of the goods insured as may arrive in a salable condition by the vessels upon board which they were shipped. But I will put another case: suppose 387] that the goods *go to the bottom of the sea, and therefore are to all appearance irrevocably lost, and the underwriters pay the amount insured; and suppose that some time afterwards these goods are reclaimed by divers, or are left dry by a very low tide, or are cast ashore by a violent storm, and reach the hands of the assured, to whom they originally belonged. This is a case of salvage; but will the underwriters be entitled to recover back from the assured the money paid in respect of the goods which have arrived, whether such goods be damaged or undamaged? I think not, for the words "without benefit of salvage" seem effectually to prevent it. It is difficult to reconcile the words "warranted free from all average" with the words "to pay loss on such part as shall not arrive;" and the best interpretation which I can give the clause is to read the latter

part as intended to make the underwriter liable in every case where the goods arrive under different circumstances from those under which they were expected, as for instance, if they arrive in a damaged condition in another ship and at a subsequent time; for in that case they do not "arrive" within the meaning of the policy. If this be the interpretation of the clause, the policy would clearly contravene the intention of the statute, for the assured might receive payment in full from the underwriters as for a total loss, and afterwards upon the arrival of the goods might derive a considerable sum from the sale of them; or he might sell the salvage at a foreign port, and so the goods might not arrive at all; he might therefore receive much more than an indemnity. It follows, therefore, that if this were a policy upon goods it would be rendered void within the reason of 19 Geo. 2, c. 37, for under some circumstances it would confer upon the assured more than complete compensation for his loss.

What I have hitherto said relates to a policy of goods. It has been contended by the plaintiffs' counsel that there can be no salvage of profits. This argument seems to be inconsistent with *Mortimer v. Broadwood*(¹). There the policy was upon profits on a cargo of timber, and the Court of Common Pleas contemplated that there might be salvage. Literally there cannot be salvage of that which is incorporeal, but there may be benefit of salvage, viz., *the benefit which would arise upon the goods arriving somewhere and being sold at an increase in price. [388 The defendant's counsel has mentioned some instances in which there may be salvage of profits insured by a policy warranted free from average; the goods may be captured by an enemy and afterwards recaptured, or the ship carrying them may be abandoned, and afterwards her cargo may be brought safely to port. In each of these cases, if the goods be ultimately sold at a profit, there may be salvage of profits. And there may well be other cases. For these reasons, and upon the cases cited, I think that a policy upon profits "without benefit of salvage" is illegal within 19 Geo. 2, c. 37. All that I have said as to profit applies to commission, and therefore I hold that the policy is also illegal so far as it relates to commission.

Only one other question requires the expression of any opinion by us. As I construe the statute, the assurance is rendered illegal from the time when the contract is entered into, and not merely from the time when the risk insured

(¹) 20 L. T. (N.S.), 398; 17 W. R., 653.

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against commences. It seems to me that an insurance contrary to the direction of the statute is so unlawful in all its incidents that the law will not countenance any part of it. Here the premium was paid for the purpose of effecting an illegal object, and therefore I think that no part of it can be recovered by the plaintiffs.

LINDLEY, J.: I am of the same opinion.

I will in the first instance examine the contents of the policy dated the 12th of January, and my remarks as to it will equally apply to the policy dated the 6th of March.

It is an insurance relating to "ship ^{and} _{or} ships, steamer ^{and} _{or} steamers," and these words obviously include British ships; in fact, it may be described either as an insurance relating to British ships with the addition, if necessary, of foreign ships, or as an insurance, relating to foreign ships with the addition, if necessary, of British ships. Therefore I cannot assent to the objection raised by the plaintiffs' counsel that this policy does not necessarily include British ships.

The subject-matter of insurance is "commission ^{and} _{or} profit." 389] I *think that we must look at the policy as consisting of one insurance, and that we cannot split it up and treat it as containing separate insurances on "commission" and "profit." My impression is that even if we could split it up, all the reasons going to show that a policy on profit may be rendered illegal by 19 Geo. 2, c. 37, equally extend to a policy on commission; but in my view the policy before us contains but one insurance, and if it is illegal as to profit, it is likewise illegal as to commission.

The important words are those contained in the clause, "warranted free from all average and without benefit of salvage, but to pay loss on such part as shall not arrive." The meaning of the warranty against average is quite clear; it provides that the underwriter is not to pay for an average loss, whether general or particular. The words "without benefit of salvage" are definite enough; they mean that if there be any salvage upon the occurrence of a loss within the terms of the policy, the underwriter is not to have the benefit of it. Then come the words "to pay loss upon such part as shall not arrive:" I think them intelligible enough, but I will presently make some further remarks upon them.

In effect we have been asked to strike out the words "without benefit of salvage" on the ground that they have no real meaning. It is difficult to see upon what principle we can do that. *Prima facie* the contract contains words which, owing to a statute, render it illegal: If it could be proved that the words were inserted by mistake, it

might be proper to rectify the contract by striking them out. But I am not satisfied that they were put in by inadvertence, and I think that some effect must be given to them.

If the insurance had been simply on profits "without benefit of salvage," the decisions in *Smith v. Reynolds* (¹), *De Mattos v. North* (²), and *Mortimer v. Broadwood* (³), would of themselves compel us to hold the policy to be illegal; they are authorities directly in point, and establish two propositions: first, that 19 Geo. 2, c. 37, applies to a policy on profits; and secondly, that profits may admit of salvage.

*It has been contended that the present case does [390 not fall within the authority of those cases owing to the insertion of the words, "but to pay loss upon such part as shall not arrive." It becomes necessary to state accurately the true meaning of this clause; and I will leave out of consideration for the moment the phrase "without benefit of salvage." I think that this clause read in connection with the warranty against average makes the underwriters liable to pay only in respect of profits on goods which do not arrive, either damaged or undamaged, before the time for payment after a loss has come. Then arises the question, What is that time, and how is it to be ascertained? No time is specified in the policy, and therefore I apprehend that in the event of a loss happening within the meaning of the policy, payment must be made at the time at which payments are ordinarily made in matters relating to marine insurance. When this customary time has expired, if the goods have arrived no payment is to be made by the underwriters; but if the goods have not then arrived the underwriters are to pay; that, I think, is the construction to be put upon the policy. Now, I will suppose a case where the goods have not arrived at the time for payment, and where after payment by the underwriters they do arrive, and are sold at an increase in price over their original cost. Can the underwriters recover any part of the money which they have paid? I know of no principle either at law or in equity which will enable them to do so. The money has not been paid under a mistaken supposition that the goods will not arrive; for it has been paid pursuant to the terms of the contract. Then the underwriters cannot take possession of the profit upon the sale of the goods and treat it as salvage; for the policy contains an express

(¹) 1 H. & N., 221; 25 L. J. (Ex.), 337.

(²) Law Rep., 3 Ex., 185.

(³) 20 L. T. (N.S.), 398; 17 W. R., 653.

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declaration that they shall not have "benefit of salvage." Therefore the assured may get more than an indemnity, and it follows that the policy is illegal within 19 Geo. 2, c. 37.

Then can the premium be recovered back? I think not. If the policy was illegal in its inception, then the whole transaction is void, and the law will not aid any of the parties; if it became illegal only when the goods were put on board British vessels, then the illegality is owing to the act 391] of the plaintiffs, who cannot *be heard to complain of the consequences of the act which they themselves have committed.

Judgment for the defendant.

Solicitor for plaintiffs: *John Rae.*

Solicitors for defendant: *Flux & Co.*

[2 Common Pleas Division, 391.]

April 23, 1877.

GAY, Appellant; CADBY, Respondent.

Scavenger, Duties of—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120) ss. 125 to 129—Refuse of Trade, &c.

Ashes arising from coals burnt in the furnace of a steam engine used for the purpose of sawing and lifting timber and other materials for carrying on the business of a pianoforte manufacturer, are "refuse of a trade, business, or manufacture," within the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 128.

[2 Common Pleas Division, 397.]

May 11, 1877.

397] *HIGHAM, Appellant; WRIGHT and Another, Respondents.

Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 52—Workmen employed in Mine with power to dismiss themselves at a Moment's Notice—Termination of Service—"Employed in or out of the Works."—Special Rules.

By the Coal Mines Regulation Act, 1872, s. 52, power is given to frame special rules for the conduct and guidance of the persons acting in the management of a coal mine or employed in or about the same. By a special rule in force in the H. mine, no person "employed in or about the works" was to ascend the pit contrary to the direction of the hooker-on. In the H. mine the workmen had power to dismiss themselves at a moment's notice. The respondents were workmen employed in the H. mine, and being dissatisfied with their working place discharged themselves. They asked the hooker-on to allow them to ascend the pit, but he refused to do so until the ordinary time came for workmen to quit the mine; the respondents however ascended contrary to his direction:

Held, that the respondents had been guilty of a breach of the special rule above-mentioned.

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[2 Common Pleas Division, 410.]

June 25, 1877.

***HUCKLE v. WILSON and Others. [410]**

Benefit Building Society—8 & 7 Wm. 4, c. 32, s. 4—10 Geo. 4, c. 56, s. 27—Action against Trustees by Retiring Member to recover Subscriptions—Reference to Arbitration or Justices—Exclusive Jurisdiction—Effect of Notice of Withdrawal.

The defendants were trustees of a benefit building society, enrolled pursuant to 6 & 7 Wm. 4, c. 32, and the statement of claim alleged that the plaintiff became a member of the society, and was the holder of first-class shares, and during his membership paid his subscriptions, that by a rule of the society any member holding first-class shares, desiring to withdraw from the society, should, *after giving [411] three months' notice, receive back the whole amount paid by him for subscriptions; that the plaintiff gave the requisite notice of withdrawal, and there then became due to him from the society the sum of £35 8s. 6d., which the plaintiff was entitled to be paid according to the rule:

Held, upon demurrer, that the statement of claim was bad; for it alleged a dispute between a building society and a member thereof, and a rule must be assumed to exist referring disputes of that kind to arbitration or justices, pursuant to 10 Geo. 4, c. 56, s. 27 (incorporated by 6 & 7 Wm. 4, c. 32, s. 4), and the mere notice of withdrawal given and assented to would not prevent the application of the rule.

[2 Common Pleas Division, 416.]

April 25, 1877.

[IN THE COURT OF APPEAL.]

PARKER v. THE SOUTH EASTERN RAILWAY CO. [416]*GABELL v. THE SOUTH EASTERN RAILWAY CO. (').**

Railway Company—Bailment—Deposit of Property in Cloak room—Ticket—Condition indorsed thereon—Knowledge of the Condition by Depositor.

On the deposit of articles at the cloak room at a railway station, a charge is made of 2d. for each, and the depositor receives a ticket, on the face of which are printed the times of opening and closing the cloak room and the words "See back," and on the back there is a notice that the company will not be responsible for any package exceeding £10. A placard upon which is printed in legible characters the same condition is also hung up in the cloak room.

The plaintiff deposited his bag, of value exceeding £10, in the defendants' cloak room, paid 2d., and received a ticket. The bag was lost or stolen. In an action to recover its value the plaintiff swore that he took the ticket without reading it, imagining it to be only a receipt for the money paid for the deposit of the article, or as evidence that the company had received the article, that he did not read the condition at the back of the ticket, nor did he see the notice hung up in the cloak room. The judge left two questions to the jury.—1. Did the plaintiff read or was he aware of the special condition upon which the article was deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself aware of the condition? The jury answered both the questions in the negative, and judgment was directed for the plaintiff:

Held, by Mellish and Baggallay, L.JJ., that there ought to be a new trial, on the

(') Reversing 18 Eng. Rep., 238.

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ground that there had been a misdirection by the judge, inasmuch as the plaintiff could be under no obligation to read the condition; and that the second question left to the jury ought to have been, whether the company did that which was reasonably sufficient to give the plaintiff notice of the condition.

Held, further by Bramwell, L.J., that, on the above facts, it was a question of law, and that judgment ought to be entered for the defendants.

ACTIONS against the South Eastern Railway Company for the value of bags and their contents lost to the plaintiffs respectively by the negligence of the company's servants.

The plaintiff in each case had deposited a bag in a cloak room at the defendants' railway station, had paid the clerk 2d., and had received a paper ticket, on one side of which were written a number and a date, and were printed notices as to when the office would be opened and closed, and the words "See back." On the other side were printed several clauses relating to articles left by passengers, the last of 417] which was, "The company will not be *responsible for any package exceeding the value of £10." In each case the plaintiff on the same day presented his ticket and demanded his bag, and in each case the bag could not be found, and had not been since found. Parker claimed £24 10s. as the value of his bag, and Gabell claimed £50 16s. The company in each case pleaded that they had accepted the goods on the condition that they would not be responsible for the value if it exceeded £10; and on the trial they relied on the words printed on the back of the ticket, and also on the fact that a notice to the same effect was printed and hung up in the cloak room. Each plaintiff gave evidence and denied that he had seen the notice, or read what was printed on the ticket. Each plaintiff admitted that he had often received such tickets, and knew there was printed matter on them, but said that he did not know what it was. Parker said that he imagined the ticket to be a receipt for the money paid by him; and Gabell said he supposed it was evidence of the company having received the bag, and that he knew that the number on it corresponded with a number on his goods.

Parker's case was tried at Westminster on the 27th of February, 1876, before Pollock, B.; and Gabell's case was tried at Westminster on the 15th of November, 1876, before Grove, J. The questions left in each case by the judge to the jury were: 1. Did the plaintiff read or was he aware of the special condition upon which the articles were deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or make himself aware of the condition?

The jury in each case answered both questions in the

negative, and the judge thereupon directed judgment to be entered for the plaintiff for the amount claimed, reserving leave to the defendants to move to enter judgment for them.

In Parker's case the defendants moved to enter judgment, and also obtained from the Common Pleas Division an order *nisi* for a new trial, on the ground of misdirection. The order was discharged, and the motion was refused by the Common Pleas Division (').

*The defendants appealed.

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In Gabell's case the defendants applied to the Common Pleas Division for an order *nisi* for a new trial on the ground of misdirection, but the court refused to grant the order. The defendants then moved for judgment and also obtained from the Court of Appeal an order *nisi* for a new trial on the ground of misdirection.

The cases were heard together.

Feb. 6, 7. *Benjamin*, Q.C., and *Bremner*, for the defendants: The plaintiffs sue on an alleged contract to keep the goods safely, but there is no contract if one party means one thing and the other party means something else; there must be a *consensus ad idem*.

[BRAMWELL, J.A.: Not so; one of the parties may so conduct himself as to lead the other to believe that there was a contract.]

A man cannot make such a claim saying that he took the ticket, but took care not to read what was printed on it though he knew that it related to the goods deposited. The plaintiff proposes to the company that they shall do something for him, and they answer, "There are our terms." He had often taken similar tickets, and knew that they had on them printed matter, and he knew that he must give back the ticket in order to get back his goods. If the porter had said "Read this," the plaintiff could not recover if he asserted merely that he had not read what was printed; and where is the difference? *Henderson v. Stevenson* (') was not a similar case; there the passenger took the ticket in a hurry, and knew nothing about it. Besides, in that case the company were common carriers bound to take the passenger on terms fixed by law; but the company are under no obligation to keep a cloak room, and they have an absolute right to prescribe the terms on which they will accept articles left there. They are not even warehousemen, for they will only take small articles for the convenience of passengers. It is absurd to hold that for a charge of 2d. a

(') See 1 C. P. D., 618, 18 Eng. R., 238, where the words printed on the ticket are set out at length.

(*) Law Rep., 2 H. L. Sc., 470.

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company ought to become liable to make good a loss of perhaps hundreds of pounds. *Harris v. Great Western Ry. Co.* (1) was a stronger case. A man is not compelled to read 419] a contract in order to be *bound by it. Here the plaintiff took the ticket, and that implies an assent. The ticket contains the terms of the contract, and the plaintiff cannot, by refusing to read it, force on the company a different contract: *Lewis v. M'Kee* (2). The company has not acted so as to induce the plaintiff to believe that they would be liable, *Cornish v. Abington* (3); and if the porter has done so he has exceeded his authority. The verdict ought to be entered for the defendants, or if not, then a new trial should be directed.

Prentice, Q.C., and *D. Brynmôr Jones*, for Gabell: The question is whether a man is bound by the contents of a printed paper merely put into his hands. It could not be pretended that any one would be bound by the terms printed on a turnpike ticket or a theatre ticket. The plaintiff says he thought the ticket was a voucher for the goods, as it was, and if so, why should he read it? It is not a question of law, but one of common sense, to be left to the jury. The company were clearly bailees for hire, and as such are *prima facie* liable, and it is for them to show that they are not.

F. Pollock (*Prentice*, Q.C., with him), for Parker: Suppose that the company had put on the ticket that if the goods were not redeemed within twenty-four hours they would be forfeited, or could not be redeemed except on payment of £5; would that have bound the plaintiff? It is no answer that that would be unreasonable, if the ticket is said to constitute a contract; nor is a depositor obliged to know what would be reasonable. To say that he is at his peril obliged to read this ticket, is to say that the general law of bailments is so absurd that a bailor must expect special conditions. No one can be expected to know that a receipt or a mere voucher given in order to secure the return of the article to the proper person contains special conditions. The questions were rightly put to the jury, and the verdict ought to stand.

Bremner, in reply: If the companies are for 2*d.* to incur indefinite liabilities they will shut up the cloak rooms. It is admitted that the terms specified on the ticket are reasonable, and it is needless to speculate on what would be the consequence if the terms were unreasonable. The depositor

(1) 1 Q. B. D., 515.

(2) Law Rep., 4 Ex., 58.

(3) 4 H. & N., 549; 28 L. J. (Ex.), 262.

had plenty of time to read what was printed, and if he did not he must take the consequences.

Cur. adv. vult.

*April 25. The following judgments were delivered ('). [420]

MELLISH, L.J.: In this case we have to consider whether a person who deposits in the cloak room of a railway company, articles which are lost through the carelessness of the company's servants, is prevented from recovering, by a condition on the back of the ticket, that the company would not be liable for the loss of goods exceeding the value of £10. It was argued on behalf of the railway company that the company's servants were only authorized to receive goods on behalf of the company upon the terms contained in the ticket; and a passage from Mr. Justice Blackburn's judgment in *Harris v. Great Western Ry. Co.* (') was relied on in support of their contention: "I doubt much—inasmuch as the railway company did not authorize their servants to receive goods for deposit on any other terms, and as they had done nothing to lead the plaintiff to believe that they had given such authority to their servants so as to preclude them from asserting, as against her, that the authority was so limited—whether the true rule of law is not that the plaintiff must assent to the contract intended by the defendants to be authorized, or treat the case as one in which there was no contract at all, and consequently no liability for safe custody." I am of opinion that this objection cannot prevail. It is clear that the company's servants did not exceed the authority given them by the company. They did the exact thing they were authorized to do. They were authorized to receive articles on deposit as bailees on behalf of the company, charging 2d. for each article, and delivering a ticket properly filled up to the person leaving the article. This is exactly what they did in the present cases, and whatever may be the legal effect of what was done, the company must, in my opinion, be bound by it. The directors may have thought, and no doubt did think, that the delivering the ticket to the person depositing the article would be sufficient to make him bound by the conditions contained in the ticket, and if they were mistaken in that, the company must bear the consequence.

The question then is, whether the plaintiff was bound by the *conditions contained in the ticket. In an ordi- [421]

(') The judgments of Mellish and Baggallay, L.JJ., were read by Bramwell, L.J.

(') 1 Q. B. D., at p. 533.

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nary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents. The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents. Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are. I hold therefore that the case of *Harris v. Great Western Ry. Co.* (*) was rightly decided, because in that case the plaintiff admitted, on cross-examination, that he believed there were some conditions on the ticket. On the other hand, the case of *Henderson v. Stevenson* (*) is a conclusive authority that if the person receiving the ticket does not know that there is any writing upon the back of the ticket, he is not bound by a condition printed on the back. The facts in the cases before us differ from those in both *Henderson v. Stevenson* (*) and *Harris v. Great Western Ry. Co.* (*), because in both the cases which have been argued before us, though the plaintiffs admitted that they knew there was writing on the back of the ticket, they swore not only that they did not read it, but that they did not know or believe that the writing contained conditions, and we are to consider whether, under those circumstances, we can lay down as a matter of law either that the plaintiff is bound or that he is not bound by the conditions contained in the ticket, or whether his being bound depends on some question of fact to be *determined by the jury, and if so, whether, in the present case, the right question was left to the jury.

Now, I am of opinion that we cannot lay down, as a matter of law, either that the plaintiff was bound or that he

(*) 1 Q. B. D., 515.

(*) Law Rep., 2 H. L. Sc., 470.

was not bound by the conditions printed on the ticket, from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread. For instance, if a person driving through a turnpike gate received a ticket upon paying the toll, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other turnpike gate, and might put it in his pocket unread. On the other hand, if a person who ships goods to be carried on a voyage by sea receives a bill of lading signed by the master, he would plainly be bound by it, although afterwards in an action against the shipowner for the loss of the goods, he might swear that he had never read the bill of lading, and that he did not know that it contained the terms of the contract of carriage, and that the shipowner was protected by the exceptions contained in it. Now the reason why the person receiving the bill of lading would be bound seems to me to be that in the great majority of cases persons shipping goods do know that the bill of lading contains the terms of the contract of carriage; and the shipowner, or the master delivering the bill of lading, is entitled to assume that the person shipping goods has that knowledge. It is, however, quite possible to suppose that a person who is neither a man of business nor a lawyer might on some particular occasion ship goods without the least knowledge of what a bill of lading was, but in my opinion such a person must bear the consequences of his own exceptional ignorance, it being plainly impossible that business could be carried on if every person who delivers a bill of lading had to stop to explain what a bill of lading was.

Now the question we have to consider is whether the railway company were entitled to assume that a person depositing *luggage, and receiving a ticket in such a [423 way that he could see that some writing was printed on it, would understand that the writing contained the conditions of contract, and this seems to me to depend upon whether people in general would in fact, and naturally, draw that inference. The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them: I think they are entitled to assume that he can read, and that he under-

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stands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak room. The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company do is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability. I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.

I have lastly to consider whether the direction of the learned judge was correct, namely, "Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself aware of the condition?" I think that this direction was not strictly accurate, and was calculated to mislead the jury. The plaintiff was certainly under no obligation to read the ticket, but was entitled to leave it unread if 424] *he pleased, and the question does not appear to me to direct the attention of the jury to the real question, namely, whether the railway company did what was reasonably sufficient to give the plaintiff notice of the condition.

On the whole, I am of opinion that there ought to be a new trial.

BAGGALLAY, L.J.: A railway company, in the conduct of their cloak room business, become bailees for reward of the articles deposited with them for safe custody; and, as such, in the absence of any special contract constituted by the delivery and acceptance of a ticket or otherwise, are re-

sponsible to the depositors for the full value of the deposited articles, if unable to restore them when demanded. This clearly would be the nature of the contract if no ticket were delivered, as occasionally happens.

In the present cases the question for consideration is whether the ordinary contract of bailment, which would have resulted from the receipt by the company of the plaintiffs' property and the payment by the plaintiffs of the prescribed charges, has been modified by the delivery of the tickets which were admittedly accepted by the plaintiffs, though, as they allege, in ignorance of the purport or effect of the printed statements indorsed upon them. If the practice of issuing cloak room tickets, containing statements of conditions intended to be binding on depositors, had become general, it might well be that a person depositing his property and accepting a ticket, even though himself ignorant of the practice, must be treated as aware of it, and as bound to ascertain whether any such conditions were stated on the ticket delivered to him; but no such practice has been shown or even suggested in either of the present cases, nor does it, so far as I am aware, exist. The primary purpose of the ticket is to identify the articles deposited and the party entitled to reclaim them, but practically, and by reason of the recognized practice of not delivering the ticket until the prescribed charge has been paid, it becomes a voucher for the payment.

So far as these purposes are concerned, the depositor has no occasion to look at the ticket until he desires to reclaim his property, and if the tickets were delivered for [425 these purposes only, the ordinary contract of bailment would be in no respect modified by the delivery of them; and in the absence of any such general practice as that to which I have alluded, it appears to me that the depositor is *prima facie* entitled to regard the ticket as delivered to him for these purposes only, and that he is in no way put upon inquiry whether the company have any further or ulterior object. But it is, of course, open to the company to show, not only that they intended that the ticket, which was delivered to the depositor primarily for his own convenience and protection, should also indicate to him certain terms and conditions in favor of the company, by which he was to be bound, but also that he was aware of such intention at the time when he accepted the ticket and that he agreed to give effect to it; the *onus* of proof is, however, upon the company in respect of these matters. Of the intention of the company to modify the contract of bailment in the

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might? Suppose the clerk or porter at the cloak room had said to the plaintiffs, "Read that, it concerns you," and they had not read it, would they be at liberty to set up that though told to read they did not, because they thought something or other? But what is the difference between that case and the present? Why is there printing on the paper, except that it may be read? The putting of it into their hands was equivalent to saying, "Read that." Could the defendants practically do more than they did? Had they not a right to suppose either that the plaintiffs knew the conditions, or that they were content to take on trust whatever is printed? Let us for the moment forget that the defendants are a *caput lupinum*—a railway company. 428] Take any other case—any case of money being *paid and a paper given by the receiver, or goods bought on credit and a paper given with them. Take also the cases put by Byles, J., in *Van Toll v. South Eastern Ry. Co.* ('). Has not the giver of the paper a right to suppose that the receiver is content to deal on the terms in the paper? What more can be done? Must he say, "Read that?" As I have said, he does so in effect when he puts it into the other's hands. The truth is, people are content to take these things on trust. They know that there is a form which is always used—they are satisfied it is not unreasonable, because people do not usually put unreasonable terms into their contracts. If they did, then dealing would soon be stopped. Besides, unreasonable practices would be known. The very fact of not looking at the paper shows that this confidence exists. It is asked: What if there was some unreasonable condition, as for instance to forfeit £1,000 if the goods were not removed in forty-eight hours? Would the depositor be bound? I might content myself by asking: Would he be, if he were told "our conditions are on this ticket," and he did not read them. In my judgment, he would not be bound in either case. I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read—no condition not relevant to the matter in hand. I am of opinion, therefore, that the plaintiffs, having notice of the printing, were in the same situation as though the porter had said, "Read that, it concerns the matter in hand;" that if the plaintiffs did not read it, they were as much bound as if they had read it and had not objected.

The difficulty I feel as to what I have written is that it is

(') 12 C. B. (N.S.), at p. 87; 81 L. J. (C.P.), 241.

too demonstrative. But, put in practical language, it is this: The defendants put into the hands of the plaintiff a paper with printed matter on it, which in all good sense and reason must be supposed to relate to the matter in hand. This printed matter the plaintiff sees, and must either read it, and object if he does not agree to it, or if he does read it and not object, or does not read it, he must be held to consent to its terms; therefore, on the facts, the judges should have directed verdicts for the defendants.

The second question left, in my opinion, should not have been *left, and was calculated to mislead the jury. [429] It might equally have been put if the plaintiffs had been told that the conditions of the contract were on the ticket, and had been asked to read them. It would then manifestly have been a question of law, and so it is now. Besides, by its terms it was calculated to mislead the jury. The question was, whether the plaintiff was under any obligation, in the exercise of reasonable and proper caution, to read the ticket. Obligation to whom? Not to himself, as people sometimes say, for there is no such duty, or if any, he may excuse himself from performing it. If it means whether a reasonably and properly cautious person might omit to read it, I say Yes. At least I hope so. Such a person might well take the matter on trust, but then he ought to be content to take the consequences of so doing. But he has no right, having omitted to inform himself, and having had the means of doing so, to make a claim which he might have fairly made had he had no such means of informing himself. The question possibly means "obligation to the defendants." That is, had the plaintiff a right to omit to do so, and then make his claim? I repeat that the same question might be put if he were told that the print contained the conditions of the contract, and then it would obviously be a question of law as it is now. The question is imperfect. The question whether of law or fact is, "Can a man properly omit to inform himself, being able to do so, and then justly claim, when he could not have claimed if he had informed himself?" The latter part of the question is left out. The authorities are in favor of this view: *Stewart v. North Western Ry. Co.* (*); *Van Toll v. South Eastern Ry. Co.* (*). There is the opinion of Willes, J., in *Lewis v. M'Kee* (*), and, lastly, the case of *Henderson v. Stevenson* (*). I need not say if I thought that that case supported the judgment I should defer to it, but I cannot understand how that can

(*) 3 H. & C., 135; 33 L. J. (Ex.), 199.

(*) Law Rep., 4 Ex., 58.

(*) 12 C. B. (N.S.), 75; 31 L. J. (C.P.), 241.

(*) Law Rep., 2 H. L. Sc., 470.

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be supposed. The plaintiff there said that he had never looked at the ticket or seen the notice on it, no one having directed his attention to either, and on this the House proceeded. The Lord Chancellor says: "Your Lordships may take it as a matter of fact that the respondent was not aware of that which was printed on the back of the ticket." Here 430] the *plaintiffs knew there was printed matter, and must have known it concerned them. The Lord Chancellor adds: "The passenger receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shown to him." I am of opinion, therefore, that the judgment should be reversed, and be given for the defendants. If not, though I think the question one of law, still, if it is of fact, it has not been left to the jury, and there should be a new trial. The possible question of fact is that set forth in the judgment of the Lord Justice Mellish, with a perusal of which he has favored me. But I repeat I think it is a question of law. I also think the verdict against evidence, and that on that ground there should be a new trial. No one can read the evidence of the plaintiffs in this case without seeing the mischief of encouraging claims so unconscientious as the present.

Orders absolute for new trials.

Solicitor for Parker: *G. W. Digby.*

Solicitor for Gabell: *M. J. Pyke.*

Solicitor for the company: *W. R. Stevens.*

See 13 Eng. Rep., 152 note; 14 Eng. Rep., 618 note; 17 Eng. Rep., 174 note; *ante*, 67 note.

[2 Common Pleas Division, 482.]

Feb. 6, 1877.

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*THRIFT V. YOULE & Co.

Shipping—Bill of Lading—Liability of Shipowner—"Not accountable for Rust, Leakage or Breakage."

The defendants caused to be shipped on board the plaintiff's vessel bales of palm baskets and barrels of oil, under a bill of lading containing the clause, "Not accountable for rust, leakage or breakage." During the voyage some of the oil escaped from the barrels, and damaged the palm baskets:

Held, that the clause in the bill of lading, exempting the plaintiff from responsibility for "leakage," did not extend to damage caused by the oil which had escaped from the barrels, and that the plaintiff was liable to compensate the defendants for the injury done to the palm baskets.

THIS was an action brought in the City of London Court to recover the sum of £12 10s. 10d., being the balance of freight due for the carriage of the defendants' goods in the

plaintiff's vessel, Susannah Thrift, from Villa Real, in Portugal, to London. The defendants gave notice of a counter-claim for £23 0s. 6d., in respect of damage done to the defendants' goods shipped on board the Susannah Thrift.

The following were the material facts: F. R. Tenorio, a merchant at Villa Real, shipped on board the Susannah Thrift 100 barrels of oil and 106 bales of palm baskets, consigned to the defendants. The captain signed a bill of lading for these goods containing the words, "Not accountable for rust, leakage, or breakage." Upon delivery of the goods to the defendants at the conclusion of the voyage, two barrels of oil were found to be quite empty, and out of the 106 bales of palm baskets no less than sixty bales were damaged with oil; and about fourteen of the sixty bales were crushed as well as saturated with oil from having been used as broken stowage on board the Susannah Thrift. At the time of shipment the goods consigned to the defendants were in sound and proper condition.

At the trial in the City of London Court the defendants admitted that the balance of freight claimed by the plaintiff had not been paid, and they did not seek to hold the plaintiff liable in respect of the oil which had escaped from the two barrels; but they claimed to recover the above-mentioned sum of £23 0s. 6d. for the injury done to the sixty bales of palm baskets. The judge *was of opinion [433 that, under the words of the bill of lading, the plaintiff was exempt from all liability in respect of leakage, but he allowed the defendants a sum of £5 15s. 1d. as damages for the injury to the bales used as broken stowage; he accordingly deducted that amount from £12 10s. 10d. claimed by the plaintiff, as already mentioned, and gave judgment for her for £6 15s. 9d.

A rule had been obtained to set aside the judgment for the plaintiff and to enter judgment for the defendants for the sum of £10 9s. 8d., the balance of their counter claim of £23 0s. 6d., after deducting therefrom the sum of £12 10s. 10d., admitted to be due to the plaintiff for freight.

Charles Hall showed cause: The only point to be now considered is, whether the clause in the bill of lading exempting the plaintiff from liability for leakage extends to damage done by leakage to other goods; and its words are wide enough to comprehend every mischief incident to the escape of the oil. There are no authorities precisely in point, but so far as they go, the previous decisions are in favor of the plaintiff. In *The Helene* (') it was held in the Privy

(') B. & L., 429.

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Council that where by a bill of lading the shipowner is not accountable for leakage, he is protected as to all leakage except that caused by negligence. In *The Nepoter* (') the plaintiffs were consignees of some casks of sugar shipped under a bill of lading containing a memorandum "not liable for leakage:" the drainage from other casks, instead of being allowed to escape, was left to accumulate round the plaintiff's casks, and caused the sugar therein to heat and to deteriorate in value. Sir R. Phillimore held that the shipowners were liable on the ground that it was the accumulation of drainage, and not the leakage itself, which caused the injury; but he seems to have been of opinion (p. 380) that if the leakage had directly produced the mischief, the memorandum in the bill of lading would have exempted the shipowners from responsibility.

J. A. McLeod, in support of the rule, was stopped.

GROVE, J.: I am of opinion that the rule must be made absolute to enter judgment for the defendants for the sum 434] of £10 9s. 8d. *The words in the bill of lading simply mean that if the goods shipped are injured by rust, or if the casks containing them become leaky or are broken, the shipowner is not to be accountable; there is nothing in the bill of lading to show that the clause is to be extended to remote consequences; and the ulterior injury arising from leakage may be of a very important kind, and nevertheless of a totally different nature: suppose, for instance, that a cask of spirits leaks, and that what escapes from it catches fire and destroys other goods; I think that this clause would not protect the shipowner from liability to compensate the owner of the goods burnt. The words "rust" and "breakage" go to show that the limited construction of "leakage" is the proper interpretation; for it is difficult to understand how rust or breakage can be mischievous to any goods besides those which themselves become rusty or are broken. For these reasons, I think that the clause in the bill of lading does not extend to collateral consequences.

The cases which have been cited do not assist the argument for the plaintiff. I need only say that in *The Nepoter* (') Sir R. Phillimore really expressed no opinion bearing upon the facts before us; and if he had, it would have amounted merely to *obiter dictum*; the injury was the indirect consequence of the accumulation of the drainage, and did not arise from the leakage itself. I do not think that that case has any relation to the present.

(') Law Rep., 2 A. & E., 375.

DENMAN, J.: I am of the same opinion. The sole question for our consideration is the meaning of the word "leakage." Some goods, such as oil stored in barrels, are apt to leak; and by the insertion of this word it was intended to protect the shipowner from liability to compensate the owner of the goods for the waste occasioned by leakage. I do not think the word can have a more comprehensive meaning. In like manner, by the use of the word "breakage," it was merely intended that the shipowner should be absolved from liability in respect of goods broken during the voyage; it would be absurd to suppose that it could extend to damage done by the broken goods to other goods. I only wish to add that the judgment of Sir R. Phillimore in *The Nepoter* (1), so far as it goes, is in favor of our decision; [435 for he confined the meaning of the word to the liquor which escaped from the casks, and declined to extend it to an accumulation of drainage which indirectly caused the mischief. *Rule absolute.*

Solicitors for plaintiff: *Henderson & Buckle.*

Solicitors for defendants: *Parker & Clarke.*

(1) Law Rep., 2 A. & E., 375.

[2 Common Pleas Division, 445.]

May 29, 1877.

***GRANT V. THE SECRETARY OF STATE FOR INDIA [445
IN COUNCIL.**

Prerogative of the Crown—Compulsory Retirement of Military Officers—East India Company's Service—Libel—Publication in Gazette.

In an action against the Secretary of State for India the claim stated that plaintiff accepted a commission in the military service of the East India Company upon the basis and faith of the customs, laws, regulations, and provisions of the company's service, which were (amongst others) that an officer entering the service should continue therein so long as he was physically and mentally efficient—and that, before the removal of any officer from any appointment, he should be made acquainted in writing with the accusation preferred against him and should be summoned to make his defence, having a reasonable time allowed him for that purpose, and that the plaintiff was compelled to subscribe to a military fund to provide for widows and orphans of officers, and that if he had continued in the service his widow would have been entitled to an allowance out of a fund called "Lord Clive's Fund." That after the Indian forces had been transferred to the Crown he, while in the performance of military duty, and in all respects physically and mentally competent to perform any duties which were or might be required of him,—was, without any charge of misconduct, called upon to retire from the service, in pursuance of a general order made by the governor general of India with the sanction of the defendant, by which order unemployed officers ineligible for employment by reason of clear misconduct, or proved physical or mental inefficiency, &c., might be required to retire upon a pension; and, upon his declining voluntarily to retire, he was compulsorily placed upon the pension list; and the fact of his removal to the pension list was notified in the usual way by a general order of the commander-in-chief published in the *Gazette*:

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Held, on demurrer, that the claim disclosed no cause of action, for the Crown, acting by the defendant, had a general power of dismissing a military officer at its will and pleasure, that the defendant could make no contract with a military officer in derogation of such powers; and the customs, regulations, &c., relied on by the plaintiff must be taken to be always subject to it, and incapable of superseding it, and further, that the publication in the *Gazette* was an official act under the authority of the Crown, for which the defendant could not be responsible in an action for libel.

CLAIM, 1. On the 3d of January, 1840, the plaintiff was appointed to an ensigncy in the military service of the East India Company in the presidency of Madras, by a commission under the hand of the Right Hon. John Lord Elphinstone, the governor and commander-in-chief of the fort and garrison of Fort St. George, and the seal of the East India Company.

2. Plaintiff entered and accepted his commission upon the basis and faith of the customs, laws, regulations, and provisions of the *East India Company's service, and which were (amongst others) that an officer entering the service should continue therein so long as he was physically and mentally efficient, and should not leave the said service without the permission of the East India Company, and that, before the removal of any officer from any appointment, he should be made acquainted in writing with the accusation preferred against him, and that he should be summoned to make his defence, having a reasonable time allowed him for that purpose, and that no officer or soldier should be punished for any military offence committed three years prior to the initiation of punitive measures.

3. In addition to the customs, rules, and regulations stated in the last paragraph, it was at the time the plaintiff entered the service as aforesaid, a compulsory regulation of the service that all persons nominated as cadets should be required, as a condition to their appointment, to subscribe to the military fund of the presidency to which they belonged. The objects of the institution of the said military fund were, to provide for the families, that is, the widows and orphans of officers; and it was a provision of the institution that the amount of the subscription of officers should be and was regulated in proportion to their respective rank and pay, the subscriptions and donations of married officers being much larger than those of unmarried officers, and otherwise as provided by the several articles by which the institution was regulated.

4. The benefits to which the widows and orphans of officers were entitled out of the military fund consisted and consist of an annuity to the widow during her life or widow-

hood, an annuity to each son up to a certain age, and an annuity to each daughter during her life or until her marriage; and the amount of the annuity to the widow depended and depends upon the rank or length of service of the officer at the time of his death.

5. By the rules and regulations of the East India Company's service the subscriptions of officers to the military fund were retained by the military paymaster from the pay of officers before the issue of such pay.

6. The plaintiff is a married man, and ever since he entered the service his subscriptions and donations to the military fund have *always been paid or deducted from [447 his pay, in proportion to his rank for the time being in the service and his position of a married man, in accordance with the regulations; and the amount contributed by him to the said fund exceeds £1,300, and his subscriptions at the time he was removed from the service as hereinafter mentioned were £58 per annum.

7. A further inducement held out by the East India Company to the plaintiff and other persons for entering their military service, and upon the faith of which he entered such service, were certain valuable advantages to which if he continued in the service his widow and orphans (if any) would if he had so long continued in the service of the company have been entitled out of a fund commonly called or known as "Lord Clive's Fund;" and by the regulations of the same fund the plaintiff's widow (if any) would have become entitled to an annuity of £114 per annum.

8. The plaintiff continued from 1840 in the service of the East India Company under the circumstances before stated, down to 1858, in which year, by 21 & 22 Vict. c. 106, "An act for the better government of India," it was (amongst other things) enacted that the government of the territories then in the possession or under the government of the East India Company, and all powers in relation to such government, should be vested in Her Majesty, and that the real and personal property of the company (except as therein mentioned) should vest in Her Majesty, subject to the debts and liabilities affecting the same (s. 39), and further, in effect, that Her Majesty's Secretary of State for India in Council should have and perform the several powers and duties in any wise relating to the government or revenues of India as might or should, except for that act, have been exercised or performed by the East India Company (s. 3), and that the Secretary of State in Council might sue and be sued in India and England by the name of the Secretary of State

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in Council as a body corporate (s. 65): and it was by that act further enacted that the military and naval forces of the East India Company should be deemed to be the Indian military and naval forces of Her Majesty, and should be under the same obligations to serve Her Majesty as they would have been to serve the company, and be entitled to the like pay, pensions, allowances, and privileges, and the 448] like advantages as regarded *promotion and otherwise, as if they had continued in the service of the company (s. 56); and, further, that the transfer of any person to the service of Her Majesty should be deemed to be a continuance of his previous service, and should not prejudice any claim to pension or any claim on the various annuity funds of the several presidencies in India which he might have had if that act had not been passed (s. 58).

9. By 29 Vict. c. 18, the funds belonging to the before-mentioned military fund were transferred to the government of India, subject to the rights of the subscribers therein and to the liabilities affecting the same; and the same government thereby became and are trustees of the same fund for the benefit of the plaintiff and his family.

10. The plaintiff in 1871 was promoted to the brevet rank of colonel. In July, 1869, he was appointed officer in charge of military pensioners and family certificate holders at Kamptee, and performed the duties of that office up to January, 1873, without any charge or complaint ever having been made against him.

12 and 13. On the 12th of January, 1873, whilst the plaintiff was perfectly in possession of his physical and mental faculties, and was capable of continuing to perform the duties upon which he was then engaged as stated in the last paragraph, or any other duty which might have been imposed upon him, he was called upon by the adjutant-general of the Madras army to send in an application to retire from the service, on the pension to which he was then entitled, viz., £365 per annum, under a general order, No. 797, dated the 1st of August, 1873, which was in the words and figures hereinafter stated in par. 17.

14. The plaintiff declined voluntarily to send in his application to retire, and continued to perform his duty, without any complaint as to his efficiency, up to the 14th of April, 1873, when he was compulsorily placed by the government upon the pension list, by the General Order of that date in par. 17 stated.

15. The plaintiff, in April, 1873, was not in the position of the persons contemplated by and described in the afore-

said order, No. 797, and such order could not legally be applied to him, he being at the time referred to in the performance of military *duties, which he performed to [449 the entire satisfaction of his immediate superior officer. And, even if he had been one of such persons, he never did any such act or was guilty of any such offence as was and is contemplated by the same order; and the aforesaid compulsory retirement of the plaintiff was effected solely with the object of preventing him by length of service from obtaining the higher grade of pension, and saving the difference to the government.

16. The plaintiff has sustained pecuniary damage arising from the fact that he has been illegally deprived since April, 1873, of the pay and allowances which whilst in the service at the date of the General Order of the 14th of April, 1873, he was enjoying, and which present pecuniary loss exceeds £1,800, and of the higher pension to which he would have been entitled had he remained in the service; and from the loss of his proper pay and allowances he is unable to keep up out of his present pension his subscription to the military fund; and the government of India, as hereinbefore stated, declare that if he fail to make any one necessary payment he will forfeit the pension to which his family may be entitled out of the fund. The plaintiff has under the circumstances stated been compelled to accept £365 per annum, being the pension to which according to the rules of the service he was entitled after twenty-six years' service. If, however, the plaintiff had continued in the service for two years longer, he would have been entitled to a pension of £456; and if he had continued in the service until the 3d of January, 1878, he would have been entitled to a pension of £1,124 per annum.

17. The plaintiff's character has been libellously defamed by the same government and the defendant, under the circumstances following, that is to say: The General Order, No. 797, dated the 1st of August, 1872, hereinbefore referred to, was partly in the words and figures following:—

The government of India, having been in communication with the Right Hon. the Secretary of State in regard to the measures to be adopted towards reducing the number of unemployed officers of the armies of the three Presidencies, the Governor-General in Council is pleased to publish for general information the following *Orders containing [450 the final decision of Her Majesty's government:—

(3.) Unemployed officers who are ineligible for public employment by reason either of clear misconduct or proved

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wise provided, one of Her Majesty's principal secretaries of state shall have and perform all such or the like powers and duties in anywise relating to the government or revenues of India, and all such or the like powers over all officers appointed or continued under this act as might or should have been exercised or performed by the East India Company or by the Court of Directors or Court of Proprietors of the said company, either alone or by the direction or with the sanction or approbation of the commissioners for the affairs of India in relation to such government or revenues, and the officers and servants of the said company respectively, and also all such powers as might have been exercised by the said commissioners alone; and any warrant or writing under Her Majesty's royal sign manual which by the act of 17 & 18 Vict. c. 77 or otherwise is required to be countersigned by the president of the commissioners *for the affairs of India shall in lieu of being so countersigned be countersigned by one of Her Majesty's principal secretaries of state."

Several Mutiny Acts have been passed with respect to the Indian forces, *ex. gr.*, 4 Geo. 4, c. 81, 3 & 4 Vict. c. 37, and 26 & 27 Vict. c. 48.

The East India Company, besides their powers to carry on trade as merchants, had by the above and previous statutes powers of sovereignty delegated to them. It is sufficient for this purpose to quote a passage from Lord Kingdown's judgment in the case of *The Secretary of State for India v. Sahaba* ('). "The subsequent statute, 3 & 4 Wm. 4, c. 85," he says, "in no degree diminishes the authority of the East India Company to exercise, on behalf of the Crown of Great Britain, and subject to the control thereby provided, these delegated powers of sovereignty."

The powers mentioned in the above quoted section, of removal or dismissal of an officer at the will and pleasure of the company, it cannot, as it seems to me, be disputed belong to the class of such delegated powers, now restored to the Crown acting by the secretary of state for India. As this power exists for the benefit of the empire and of Her Majesty's subjects, it could not in my judgment be contracted away by the East India Company. If with one officer such a contract could be made, it could with all. In fact the plaintiff's case apparently is that it was made with all. If so, all officers whom a jury might consider to be "physically and mentally efficient" could retain their places in the army notwithstanding they were found to be

(') 13 Moo. P. C., 22, at p. 77.

most unsuitable for them. The consequences of such a state of things to the well-being of the realm would be most disastrous. It would prevent that power of dealing with officers according to their fitness for duty as judged by their superior officers; it would be fatal to the maintenance of discipline; and, in time of war, mutiny, or insurrection, might well be fatal to the state and commonwealth. It does not need enlarging upon.

In the case of *John Waller Poe* (1), which was an application for a prohibition to restrain the execution of the sentence of a court martial, Lord Denman, in giving judgment, says (2): "If, then, *the writ were to issue at all, we [456 see no court or individual to whom it could be addressed other than the King himself, who, acting on the sentence, has been pleased to dismiss the officer from his service. Now, admitting for a moment that it were possible to address any writ directly to His Majesty, when it is considered that this power is undoubtedly inherent in the Crown, and might have been lawfully executed even without any court martial, it will at once appear manifest that no prohibition can lie in such a case; for, what the King had power to do independently of any inquiry, he plainly may do though the inquiry should not be satisfactory to a court of law, or even though the court which conducted it had no legal jurisdiction to inquire."

In *Gibson v. East India Co.* (3), which was a case of claim by the assignees in bankruptcy of a military officer of the East India Company for his retiring pension, Tindal, C.J., though of opinion that the East India Company might have made a grant under seal for the payment of the pension, says, speaking of a right of action for half-pay,—“Now, it is clear that no action could be supported against any one to recover the arrears of half-pay granted by the Crown, at least unless the money has been specifically appropriated by the government and placed in the hands of the paymaster or agent to the account of the particular officer: and there is no ground upon general principle to hold that an action could be maintained against any one, unless under the same circumstances, in the present case. It was, indeed, strongly argued at the bar, that, as the resolution under which the retiring pensions are paid has been sanctioned by the commissioners for the affairs of India, it has by such approval become obligatory on the company, and in the nature of a contract; but we think there is no ground for giving such operation to the act. The object of the statute

(1) 5 B. & Ad., 681.

(2) At p. 688.

(3) 5 Bing. N. C., 262, 274.

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(33 Geo. 3, c. 52) was that of creating a board of commissioners to superintend, direct, and control, the acts, operations, and concerns relating to the civil and military government or revenues of the company's territories and acquisitions in the East Indies; to make the approval of the board essential before instructions are sent out, but not to give additional force or legal obligation to the resolution itself beyond that 457] which it originally possessed. The *grant in question, therefore, appears to us to range itself under that class of obligations which is described by jurists as imperfect obligations,—obligations which want the *vinculum juris*, although binding in moral equity and conscience; to be a grant which the East India Company, as governors, are bound in *foro conscientiae* to make good, but of which the performance is to be sought for by petition, memorial, or remonstrance, not by action in a court of law. Many grounds of inexpediency in allowing a claim of the present description to be recoverable in a court of law readily suggest themselves. If the retired pension which is given for former services can be recovered by action, why should not the pay and allowances for actual service be equally so during their continuance? And yet how frequently is it not only expedient, but absolutely necessary, that military pay should be suspended and kept in arrear beyond the day when it becomes due, and until the service in respect of which it is earned has been entirely completed? Not to mention the expense and inconvenience which must arise if a suit might be instituted by each individual officer, and the prejudice which such litigation would necessarily occasion to the military service. But, if the allowance of this pension will furnish a ground of action against the company, no legal distinction can be assigned why the grant of pay during actual service, which is authorized by general orders founded on resolutions of the directors, confirmed in the same manner by the board of commissioners, should not be equally the ground of an action at law."

In *Ex parte Napier* (*), which was an application for a mandamus to the East India Company to command them to pay arrears of pay to Sir C. Napier, due to him as commander-in-chief of the forces of the Queen and of the East India Company, Lord Campbell says (*): "The applicant must make out that there is a legal obligation on the East India Company to pay him the sum he demands, and that he has no remedy to recover it by action. The latter point becomes material only when the former has been established ;

(*) 21 L. J. (Q.B.), 332.

(*) At p. 333.

for, the existence of a legal right or obligation is the foundation of every writ of mandamus; but it seems to us that the attempt to show that there was any obligation on the East India *Company, which the law will enforce, to pay [458 any sum of money to Sir Charles Napier, either as commander of the Queen's forces, or as commander of the native troops, has entirely failed. A legal obligation, which is the proper substratum of a mandamus, can only arise from common law, from statute, or from contract. Of course, the obligation here contended for cannot arise from the common law, and is not rested on contract." And, after going through several statutes relating to the East India Company, and referring to the case of *Gibson v. East India Company* (1), the rule for a mandamus was refused.

In a recent case, *In re Tuffnell* (2), which was a petition of right by a military surgeon for compensation for having been put on half-pay, he having, as alleged, on condition of waiving his right to promotion, been appointed to the permanent medical charge of the military prison at Dublin, and afterwards compulsorily retired on half-pay, Malins, V.C., held on demurrer that the court had no jurisdiction to inquire into the circumstances under which he held the office, and that the office, like all others in the army, was only tenable *durante bene placito*.

In the case of *Dickson v. Lord Combermere and General Peel* (3), which was an action against the defendants for causing, by means of false charges, the removal of the plaintiff from the office of lieutenant-colonel of a regiment of militia, Cockburn, C.J., lays it down generally that a high officer of state is not responsible for an act done by him in the honest discharge of his public duty: and, upon counsel suggesting that "there may be an exception in the case of a judicial act," his Lordship says: "No; nor is this a judicial act at all. It is an exercise of the pleasure of the Sovereign through a high officer of state. The Sovereign has the power of dismissing any officer. He receives his commission from his Sovereign, and holds it at his pleasure; and it is in the will of the Sovereign to withdraw it. It is the will of the Sovereign to exercise that power through responsible servants of the Crown, and they are not responsible for its exercise before a jury."

Assuming that the East India Company could contract with a *military officer, does the statement of claim [459 disclose such a contract? The alleged contract is contained in paragraph 2, which I have already given *verbatim*. The

(1) 5 Bing. N. C., 262.

(2) 3 Ch. D., 164.

(3) 3 F. & F., 527, 585.

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statement does not say that the East India Company entered into an express binding contract not to dismiss him, or that it guaranteed or pledged itself that he should continue in the service so long as he was physically and mentally efficient, or that its rules should never be altered; but it alleges that he entered the service on the basis and faith of such "customs, law, regulations, and provisions." The word "laws" in this paragraph, read with the context, I do not take to mean statutes or laws of the realm, but laws in the sense of rules, or analogous to by-laws. Doubtless, in many cases, as between individuals or companies or corporations, the entering a service upon rules stated by the dominant person or body would constitute a contract; but, military service being as I have stated in many particulars different from an ordinary service under a contract, it seems to me that the terms used in this paragraph must be taken in the sense of their proper application to military service, which is the service spoken of in the paragraph; and that, so read, they must be taken to refer to existing customs, laws, regulations, and provisions, subject to be changed by the necessities inherent in military regulations, and not overriding the power of dismissal or removing at will. Sect. 56 of 21 & 22 Vict. c. 106, does not, it seems to me, alter this view; perhaps it strengthens it by saying that the forces shall be subject to all acts of Parliament, laws of the Governor General of India, and articles of war, and all other laws, regulations, and provisions relating to the East India Company's military and naval forces respectively, as if Her Majesty's Indian military and naval forces respectively had throughout such acts, laws, articles, regulations, and provisions been mentioned or referred to instead of such forces of the said company.

The majority of officers enter the military or naval service on the basis and faith of the existing rules of the service; but this cannot be held to constitute a contract not to dismiss or remove them at will.

I am not wholly free from doubt on this second point, which doubt however only rests upon the technical necessity 460] on demurrer *of assuming the truth of the facts alleged in the pleading demurred to.

With regard to the claim at the end of the plaintiff's statement, it is proper to observe that he does not claim a return of the money he has subscribed to the military fund, but only claims the ultimate benefit of it. I presume he is not prevented by the government from continuing to subscribe, as he states (par. 16) that from want of means he is

unable to keep up his subscription. Whether, if he discontinues his subscription, he can recover the money paid, I am not called on to decide, as he does not claim the repayment of this money. And with regard to Lord Clive's Fund, under which the plaintiff states (par. 7) his widow and orphans, if any, would be entitled to certain valuable advantages, he states no present loss or damage or refusal to pay in the future.

If the widow or orphans of an officer removed to the retired list are by the rules of the service entitled to any advantage out of this fund, the plaintiff's widow and orphans will obtain it: any claims he may have are, as stated in 21 & 22 Vict. c. 106, s. 58 (preserved by 22 & 23 Vict. c. 27), not prejudiced by that act. If in consequence of his removal he ceases to be entitled to them, and I am right that the East India Company had, and now the government has, the power of dismissing or removing him at will, the plaintiff must abide the consequences of the removal.

It may be worth observing that, by the judgment of the House of Lords in 1863, in the case of *Walsh v. The Secretary of State for India* (*), the funds contributed by Lord Clive were held, after the transfer of the East India Company's forces to the Queen, to have, subject to existing annuities, become payable to the representatives of Lord Clive, by virtue of a covenant by the East India Company in the original deed.

The plaintiff secondly complains in his statement of claim of libel, alleging that his character has been libellously defamed by the government of India and by the defendant. The claim then sets out a general order (par. 17) for the removal to the pension list of unemployed officers ineligible for public employment by reason of (shortly stated) misconduct or physical or mental inefficiency. *It further sets out a general order of the 14th of April, 1873, published in the *Gazette*, stating the removal of the plaintiff to the pension list under the authority of Her Majesty's government, referring by number to the previous general order, and ending with the words "By order of His Excellency the Commander-in-Chief." It then (par. 18) states that the plaintiff was not ineligible for public employment within the terms of the order, and claims damages against the defendant.

It is to be observed that, by the statement of claim, the charge against the defendant is of an act in his official character as secretary of state for India, or rather of a re-

(*) 10 H. L. C., 367; 32 L. J. (Ch.), 585.

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sponsibility attaching to him in his official character. He is not alleged to be personally cognizant of the publication in the *Gazette* of the 14th of April, 1873, which does not bear his name. Nor is it alleged that it was published maliciously and without reasonable and probable cause. The statement of claim, moreover, does not allege that the publication in the *Gazette* is not a true record of the act of the commander-in-chief, under the authority of Her Majesty's government.

In the case of *Gidley v. Lord Palmerston* (¹), which was an action brought against the secretary at war by a retired clerk of the war office, for his retired allowance, Dallas, C.J., in giving judgment for the defendant says (²): "But it must also fail on another and a wider ground. This is an action brought against the defendant, as paymaster-general, for an alleged breach of an implied undertaking said to attach upon him in that character. With reference to this ground it will be sufficient to advert to a class of cases too well known and established to require to be more particularly mentioned, and which in substance and result have established that an action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be in the particular instance a breach of such employment, and constituting a particular and personal liability. Such persons, said Lord Mansfield in one of the cases cited at the bar (³), are not understood personally to contract; and in the same case it was observed by Mr. Justice Ashhurst, 'In great questions of policy, we cannot 462] argue from the nature of private *agreements.' . . . 'Great inconveniences would result from considering a governor or commander as personally responsible.' . . . 'No man would accept of any office of trust under government upon such conditions; and, indeed, it has frequently been determined that no individual is answerable for any engagements which he enters into on their behalf. There is no doubt that the Crown will do ample justice to the plaintiff's demands, if they be well founded.' Mr. Justice Buller in the same case adds: 'Where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable.' And in a subsequent case (⁴), it is held that a servant of the Crown contracting on the part of government is not personally answerable. I am aware that these cases are not in their circumstances precisely similar to the present; and, perhaps in respect of some of

(¹) 3 B. & R., 275.

(²) At p. 285.

(³) *Macbeath v. Haldimand*, 1 T. R., 172.

(⁴) *Unwin v. Walsley*, 1 T. R., 674.

the circumstances belonging to the present case, I may personally have doubted longer than, I am now satisfied, I ought to have done; but, in their doctrine, they go to this, that, on principles of public policy, an action will not lie against persons acting in a public character and situation, which from their very nature would expose them to an infinite multiplicity of actions, that is, to actions at the instance of any person who might suppose himself aggrieved; and, though it is to be presumed that actions improperly brought will fail, and it may be said that actions properly brought should succeed, yet the very liability to an unlimited multiplicity of suits would in all probability prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself."

It is true this was an action of contract; but the reasons given in the judgment apply generally to "an action against a public agent for anything done by him in his public character or employment," and, as it appears to me, apply *à fortiori* to an action of tort where there is no charge of personal action or personal malice. As many of the earlier authorities are cited in this case, I need not refer to them.

Dawkins v. Lord Paulet (1) was an action for libel brought by an officer in the army against his superior officer, the commander of the brigade, for reports made to the adjutant-general as to the *conduct and fitness [463 of the plaintiff. To the declaration there was a plea that the defendant made the reports in the course of military duty, and as an act of military duty. To this there was a replication that the libel was written by the defendant of actual malice, without reasonable, probable, or justifiable cause, and not *bona fide* or in the *bona fide* discharge of the defendant's duty. On demurrer to this replication, Mellor and Lush, J.J., stating that the late Mr. Justice Hayes agreed with them, held that the replication was bad, Cockburn, C.J., dissenting: but the Lord Chief Justice agreed "that acts done in the honest exercise of military authority are privileged" (2).

In *Dawkins v. Lord Rokeby*,—not the libel case in the House of Lords, which turned upon the privilege of a witness in a military court of inquiry, but at *nisi prius* (3),—in an action for false imprisonment, malicious prosecution, and conspiracy, Willes, J., held, referring to the well-known case of *Sutton v. Johnstone* (4), that a court of law will not

(1) Law Rep., 5 Q. B., 94.

(2) Law Rep., 5 Q. B., at p. 102.

(3) 4 F. & F., 806.

(4) 1 T. R., 493, 784.

take cognizance of matters of military discipline between military men, and nonsuited the plaintiff.

The publication in the *Gazette* of military appointments, retirements, &c., is an ordinary act of government, and purports so to be in this statement of claim, which, as I have said, alleges no malice, improper motive, or personal act by the defendant, but treats him as acting officially, and sues him as secretary of state for India in council. Indeed, it is only by assuming the *Gazette* to be the official organ of government that the plaintiff can in any way connect the defendant with the alleged libel.

I am of opinion that if, as the last cited cases show, the commander-in-chief could not be sued for libel, for an act done in the course of his military duty, the secretary of state is not liable for the publication of an act done in respect to a military officer in pursuance of government orders and regulations applying to military service.

I might decide this point upon the narrower ground that there is no averment that the defendant personally ordered, sanctioned, or knew of the publication in the *Gazette*, and that the statement in the order itself that it is under the 464] authority of government, it *being signed "Commander-in-Chief," is no sufficient allegation that the publication was the act of the defendant; but I prefer deciding it upon the broader ground, as, if I am right as to that, great expense may be saved to the plaintiff. I will add that, if I am right as to the first point, viz., that the act of removal is not within the cognizance of this court, it seems to me that the publication in the official government record of that act, being obviously necessary for the information of those whom it may concern, is in my judgment also not within the competence of this court.

I am of opinion that the statement of claim discloses no cause of action, and that the demurrer must be allowed.

Judgment for the defendant.

Solicitor for plaintiff: *W. F. Nokes.*

Solicitor for defendant: *H. S. Lawford.*

[2 Common Pleas Division, 464.]

April 30, 1877.

**THE OMOA AND CLELAND COAL AND IRON COMPANY V.
HUNTLEY.***Shipping—Construction of Charterparty—Liability of Shipowner to Charterers for Negligence of Master and Crew.*

The plaintiffs hired from the defendant a vessel under a charterparty, by which the vessel was let to the plaintiffs for a specified time, and they were to have the whole reach of her holds except what was reserved to the owner for the crew; the crew were to assist in loading and discharging, and the captain was to sign bills of lading and to furnish to the charterers a copy of the log. The defendant engaged and paid the master and crew. Whilst the vessel was upon a voyage under the charterparty, with a cargo on board belonging to the plaintiffs, she and her cargo were lost by the negligence of the master and crew:

Held, that the master and crew were the servants of the defendant for the purpose of navigating the vessel, and that he was liable to compensate the plaintiffs for the loss sustained by them.

SPECIAL CASE stated pursuant to a judge's order.

The plaintiffs were a trading company carrying on business in Glasgow. The defendant was the owner of the steamship *Vesper* up to the time of her loss as hereinafter mentioned. On or about the 17th August, 1875, the defendant chartered the *Vesper* to *the plaintiffs. The char- [465
terparty contained, amongst others, the following clauses:—

“The said vessel or steamer being tight, staunch, and strong, and in every way fitted for the voyage or service, and so maintained by owners, with a full complement of officers, seamen, engineers and firemen adapted to a steamer of her class, shall be placed under the direction of the charterer, merchant, or his assigns, to be by him or them employed for the conveyance of lawful merchandise ^{and} passengers as follows—between ports in the U. K. and the Continent, Baltic and Black Sea being excluded between 1st September and 1st March, as may be ordered by the charterers, the cargoes to be laden or discharged in any dock or other safe place the charterers may order.

“The steamer is let for the sole use of the charterers, and for their benefit, for the space of six months, with option of twelve calendar months at charterers' option, commencing from the vessel's being ready at Grangemouth to be at the disposal of the charterers.

“The charterers to have the whole reach of the vessel's holds and usual places of loading, including passengers' accommodation, if any, sufficient room being reserved to the owners for the crew, necessary tackle, apparel, and

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furniture of the vessel, and she is not to be required to load more than she can reasonably stow and carry over and above her tackle, provisions, stores, and fuel.

"The captain shall use all and every dispatch possible in prosecuting the voyages, and the crew are to render all customary assistance in loading and discharging.

"The captain to sign bills of lading as presented without prejudice to this charterparty, to follow the instructions of the charterers or their assigns or consignees as regards loading, discharging, and departure.

"The coals for the steam engines shall be supplied by and at the cost of the charterers, as also all port and dock charges, pilotage, and extra laborage that may be required in addition to the crew for loading and discharging, the owners finding all ship's stores, paying crew's wages, and necessary stores for the engine room, that is, oil, tallow, and waste, also dunnage and insurance on ship.

466] * "The freight for the hire of the steamer shall be as follows, videlicet—Four hundred and ten pounds per month payable in advance monthly until the vessel is again returned by the charterers, he or they having previously given not less than fourteen days' notice.

"The vessel to be delivered up to the owners, on the termination of this charterparty, at Clyde or Forth. All derelicts and salvages for owners' and charterers' equal benefit.

"The captain to furnish the charterers, their agent or supercargo, when required, a true daily copy of log, and to take every advantage of wind by using sails with a view to economize the expenditure of coal."

The vessel proceeded to Glasgow under the charterparty, and there loaded for Dunkirk a cargo of coals, and on or about the 10th of January, 1876, she sailed for Dunkirk under the charter with the goods on board. In the course of the voyage the vessel was stranded and went to pieces, and the cargo was totally lost. For the purposes of the decision of the special case, it was to be assumed that the loss of the vessel and cargo was caused solely by the negligence of her master and crew.

The plaintiffs contended that on the true construction of the charter the master and crew of the vessel were the servants of the defendant, and that the defendant was liable for the loss caused by their negligence.

The defendant contended that on the true construction of the charter the master and crew were not the servant of the defendant so as to make him liable to the plaintiffs for their

negligence, and that he was not liable to the plaintiffs for their negligence.

The question for the opinion of the court was, which of the contentions was correct.

C. P. Butt, Q.C. (*J. C. Mathew* with him), for the plaintiffs, cited *Laugher v. Pointer* ('); *Quarman v. Burnett* ('); *Fletcher v. Braddick* ('); *Fenton v. City of Dublin Steam Packet Co.* ('); *Schuster v. McKellar* (').

**Herschell*, Q.C. (*John Edge* with him), for the [467 defendant, cited *Newberry v. Colvin* ('); *Sack v. Ford* ('); *Sandeman v. Scurr* ('); *Rourke v. White Moss Colliery Co.* (').

It was admitted during the argument that the defendant engaged, and in fact paid, the master and crew.

DENMAN, J.: I think that the plaintiffs are entitled to our judgment. The defendant engaged, and in fact paid, the master and crew; but it cannot be inferred from the facts before us that he had any reason for supposing them to be unfit to discharge their duties; the question, therefore, turns upon the construction of the charterparty entered into between the plaintiffs and the defendant; and in my opinion, if this document be read as a whole, it really was intended that, so far as concerned the navigation of the vessel, the owner was to retain her under his control for the purpose of carrying out the terms of the contract. It is provided that the *Vesper* "shall be placed under the direction" of the plaintiffs; at first sight this clause appears to favor the contention for the defendant; for it seems to imply that the plaintiffs were to have the sole control of the vessel; but on further consideration it is evident that the clause merely empowers the plaintiffs to determine when she is to sail and between what ports she is to trade. Subsequent clauses provide that part of the vessel is to be reserved to the owner for the crew, that the captain is to use all dispatch, that the crew are to render customary assistance, that the captain is to sign bills of lading, that the coals are to be supplied at the charterers' expense, and that the captain is to furnish the charterers with a copy of the log, and to take every advantage of wind by using sails. These provisions are quite inconsistent with the contention for the defendant, that the navigation of the vessel was to be com-

(') 5 B. & C., 547.

(') 6 M. & W., 499.

(') 2 B. & P. (N.R.), 182.

(') 8 A. & E., 835.

(') 7 E. & B., 704; 26 L. J. (Q.B.), 281.

(') 7 Bing., 190, in Ex. Ch.; sub nom.

Colvin v. Newberry, 1 Cl. & F., 283, at p. 297, per Lord Tenterden, in H. L.

(') 13 C. B. (N.S.), 90; 32 L. J. (C.P.), 12.

(') Law Rep., 2 Q. B., 86.

(') *Ante*, p. 205.

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mitted to the control of the plaintiffs; for if the master and crew had been their servants, these stipulations would have been useless. The provision as to the delivery up of the vessel at the termination of the charterparty merely means, 468] that whatever possession of the vessel the *plaintiffs might take should be relinquished by them within the agreed time at the ports named. Therefore, construing the charterparty as a whole, and giving effect to every part of it, I think that by its terms the owner of the Vesper was to supply the master and seamen, and to have, through them, the management of the navigation. The cases cited by the plaintiffs' counsel seem to establish that the master and crew would be held to be the servants of the defendant in actions by third persons, and for the reasons which I have given, I must hold them to be his servants as between him and the plaintiffs. Now a person who contracts to provide workmen or seamen to perform a specified undertaking, is bound to make good any injury which the other party to the contract may sustain from their omission to perform their duty in a proper manner. Here those who were employed by the defendant have, by their negligence, inflicted an injury upon the plaintiffs, who are entitled to recover from him compensation for the loss sustained by them.

LINDLEY, J.: I am of the same opinion. The authorities do not throw much light upon the question to be decided; the important matter to be considered is the language of the charterparty. The more the words are studied, the more plain does it become that the Vesper was to be navigated by the defendant. In order to ascertain whose servants the captain and crew were, it is only necessary to observe what power the plaintiffs had over them. It appears plain, upon a review of the contents of the charterparty, that, except for certain specified objects, the captain and crew were to remain under the control of the defendant. The plaintiffs might direct where the vessel was to go, and with what she was to be laden, and the charterparty contains certain provisions for the protection of their interests; but the defendant remained in all respects accountable for the manner in which the vessel might be navigated.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Waltons, Bubb & Walton.*

Solicitors for defendant: *Shum, Crossman & Crossman.*

[2 Common Pleas Division, 469.]

June 2, 1877.

[IN THE COURT OF APPEAL.]

*TWYXCROSS V. GRANT and Others.

[469]

Joint Stock Company—Fraudulent Prospectus—Concealment of Contracts affecting the Company—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38—Words “Knowingly Issuing”—Measure of damages

Action brought by the plaintiff under the Companies Act, 1867, s. 38, to recover the amount paid by him on certain shares taken by him in the L. Company on the ground of the fraud of the defendants (promoters of the company), in omitting from the prospectus two contracts entered into by them as promoters—the one a contract between the defendants C. & P. and one S., for the purchase of certain foreign concessions for the construction of tramways which the company was afterwards incorporated to make and work; the other a contract between the defendants, C. & P. and the defendant G., as to certain payments to be made by C. & P. to G. in consideration of his obtaining for them a contract from the company for the construction of the tramways, by means of which fraud the plaintiff had been induced to take the shares, which proved worthless. The jury found that these contracts were material to be made known to the intended shareholders of the company :

Held, by the Common Pleas Division and in the Court of Appeal by Cockburn, C.J., and Brett, L.J., that the contracts ought to have been specified in the prospectus, and that the defendants were liable; Kelly, C.B., and Bramwell, L.J., dissenting :

Held, by the Common Pleas Division and in the Court of Appeal, by Cockburn, C.J., Bramwell and Brett, L.J.J., that the words “knowingly issuing” in s. 38 mean intentionally issuing a prospectus without inserting the contracts which are required by that section to be specified, although they are omitted under the *bona fide* belief that it is unnecessary to specify them.

At the trial the judge directed the jury that if the real damage occasioned to the plaintiff by the defendants’ fraud was the price he paid for the shares, he was entitled to recover that amount. The jury assessed the damages at the price paid by the plaintiff :

Held, by Cockburn, C.J., Bramwell and Brett, L.J.J., affirming the judgment of the Common Pleas Division that the direction was right, and that the shares taken by the plaintiff being worthless he was entitled to recover the amount paid by him for them : Kelly, C.B., dissenting.

THIS was an action founded upon s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131), which enacts that “every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of *such [470] prospectus or notice, whether subject to adoption by the directors of the company or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract.”

The first count of the declaration (1) stated that the defendants Grant, Clark & Punchard, were the promoters of a company called The Lisbon Steam Tramways Company, Limited, being a joint stock company having a capital divided into shares, and duly registered under a memorandum and articles of association under the Companies Acts, 1862 and 1867 (2); and the defendants, being promoters of the company, before the issue of the prospectus and notice hereinafter mentioned, had entered into a contract with each other in the words and figures following, that is to say,

Memorandum of an agreement made the 6th of July, 1871, between Messrs. Edwin Clark, Punchard & Co., of &c., contractors, of the one part, and Messrs. Grant & Co., of &c., bankers, of the other part, whereby it is agreed as follows :

1. In consideration of the expenses incurred and to be incurred and the services rendered and to be rendered by Messrs. Grant & Co. in and about the obtaining for the said E. Clark, Punchard & Co. of a contract upon such terms as shall be satisfactory to the said E. Clark, Punchard & Co., from the Lisbon Steam Tramways Company for constructing and equipping certain lines of tramways, and also in and about the formation of the said company, and in and about the preparation of and advertising and making public the prospectus of the company, and in using their best endeavors to raise and place the capital thereof, E. Clark, Punchard & Co. shall pay to Messrs. Grant & Co. the sum hereinafter mentioned at the times and in the manner following, that is to say, the sum of £30,000 in cash out of the first payment which E. Clark, Punchard & Co. shall receive under or by virtue of the said contract, and the further sum of £10,000 in cash as follows, viz., £5,000 out of the second payment and £5,000 out of the fourth payment which E. Clark, Punchard & Co. shall receive under the said contract, as and when received; and the said Clark, Punchard & Co. shall also pay or hand over to Grant & Co. £5,800 in fully paid up shares of that nominal amount, or, at the option of Clark, Punchard & Co., a similar amount, that is to say, £5,800 in cash on the second instalment being paid to Clark, Punchard & Co., such option to be declared by them within thirty days after the first allotment of shares shall be made by the company.

2. In the event of Clark, Punchard & Co. being required by the company to 471] *take any part of the payments to be made to them by the company in respect of the works to be executed by them under their said contract in 8 per cent. debentures of the company, Grant & Co. shall take from Clark, Punchard & Co. one fourth of any debentures they may be called upon to take instead of cash, at the price of £80 for every £100 debenture.

3. Clark, Punchard & Co. further agree that, in the event of Grant & Co. declaring within thirty days after the first allotment of shares shall be made by the company that they require Clark, Punchard & Co. to take up shares in the company to an extent not exceeding 4,200 shares in the whole, Clark, Punchard & Co. will accept a transfer or transfers of such shares as they may be so required to take, and shall pay to Grant & Co. the par value of such shares, that is to say, the sum per share which for the time being shall be called upon the said shares, upon such transfer or transfers being tendered to them duly executed by the transferor or transferors.

4. It is understood that all the shares hereinbefore referred to and which may be taken by the parties hereto shall be held by them respectively, and shall not be dealt with or disposed of until the completion of the contract hereinbefore mentioned. As witness, &c.

And the said Lisbon Steam Tramways Company mentioned in the said contract is the same company as is here-

(1) Delivered 5th July, 1875. (2) 25 & 26 Vict. c. 89, and 30 & 31 Vict. c. 181.

inbefore mentioned; and the defendants, after the making and entering into of such contract, and after the passing of the Companies Act, 1867, and after the 1st of September, 1867, knowingly and fraudulently, and with intent to induce persons to take shares in the said company, and well knowing the premises, issued and caused to be published a prospectus of the said company, and also issued and caused to be published a notice inviting persons to subscribe for shares in the said company, which said prospectus and notice did not nor did either of them specify the dates, and names of the parties to the contract; and the plaintiff, on the faith of such prospectus and notice, respectively, took shares in the company and paid to the company a large sum of money in respect thereof; and the plaintiff had no notice of such contract, there being a contract within the meaning of s. 38 of the Companies Act, 1867; and the said shares were and are of no value to the plaintiff, and he has lost the moneys he so paid to the company as aforesaid.

Second count, that the defendants were the promoters of a company called the Lisbon Steam Tramways Company, Limited, being a joint stock company having a capital divided into shares and duly registered under a memorandum and articles of association under the Companies Acts, 1862 and 1867; and the defendants *Clark & Punchard, [472 being promoters of the company, before the issue of the prospectus and notice hereinafter mentioned had entered into a contract with His Excellency Field Marshal the Duke de Saldanha, who was a director of the company, and which contract was in the words and figures following,

Memorandum of an agreement made the 5th of July, 1871, between His Excellency Field Marshal the Duke de Saldanha, of the one part, and Messrs. Edwin Clark, Punchard & Co., of the other part, whereby it is agreed:—

1. The Duke de Saldanha shall transfer and make over to Clark, Punchard & Co. such part and interest of and in the concessions granted to the Duke de Saldanha by royal decrees of the kingdom of Portugal as enables the Duke de Saldanha to establish, maintain, and work for the term of ninety years from the 15th of May, 1871, railways on the system Larmanjat on the roads from Cascaes to Cintra and Pero Pinheiro, and from Lisbon through Lumiar to Torres Vedras, with all the rights, privileges, and advantages to the said part and interest in the said concession belonging or appertaining, or in any way incident thereto. The Duke de Saldanha shall also transfer and make over to Clark, Punchard & Co. the existing railway on the road from Lisbon to Lumiar, with all the rolling-stock, materials, implements, and appurtenances thereto belonging.

2. The Duke de Saldanha having made application to the proper authorities in Portugal for the grant of a concession for the like period of ninety years of the right to establish, maintain, and work steam tramways on the road from Lisbon to Cascaes, and having received a formal promise from the minister of public works that the concession so applied for as aforesaid shall be granted to him, hereby agrees to obtain such concession and to transfer and make over the same to Clark Punchard & Co. within the space of thirty days from the date hereof.

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3. The Duke de Saldanha shall also transfer and make over to Clark, Punched & Co., the right and interest of him the Duke de Saldanha of and in the invention of Jean Larmanjat of a new system of mixed railway with a single rail, to such extent as will enable the invention to be used and applied upon the roads mentioned in clause 1 of this agreement, but not further or otherwise.

4. The consideration or price to be paid to the Duke de Saldanha for such transfer as aforesaid shall be the sum of £22,000, of which the sum of £6,000 shall be paid in cash, and the remainder, viz., £16,000, in fully paid up shares in a company now in course of formation intended to be called the Lisbon Steam Tramways Company, Limited, for the purpose of constructing, maintaining, and working steam tramways or railways upon the roads in Portugal hereinbefore mentioned upon the system Larmanjat.

5. The sum of £6,000 so intended to be paid in cash shall become due and be payable to the Duke de Saldanha within three calendar months after the first allotment of shares in the company shall have been duly made to the public and the payment made on such allotment; and the 1,600 fully paid up shares representing the remaining £16,000 to be received by the duke shall at the same time be delivered to him or as he may direct.

6. Messrs. Clark, Punched & Co. shall hold harmless and indemnify the Duke de Saldanha against all claims and demands of Larmanjat for royalties, 473] dues, *or charges in respect of the use of his invention upon the railways mentioned in clause 1 of this agreement, or in respect of the construction, maintaining, and working thereof.

7. In the event of the capital of the intended company not being subscribed to such an extent as in the opinion of the board of directors thereof, and with the concurrence of Clark, Punched & Co. is sufficient to warrant them in proceeding to allot the shares to the public, or in the event of Clark, Punched & Co. not obtaining from the company the contract for constructing and equipping the said railways, then and in such case this agreement shall be of no effect, and every clause, matter and thing herein contained shall cease and be void.

8. It is also hereby further agreed that the 1,600 fully paid up shares in the Lisbon Steam Tramways Company hereinbefore agreed to be delivered to the Duke de Saldanha shall not be dealt with or disposed of by him, but shall be held until the steam tramways about to be constructed by the company have been completed and opened for traffic. As witness, &c.

And the Lisbon Tramways Company, Limited, mentioned in the said contract, is the same company as is hereinbefore mentioned, and the defendant Grant as well as the defendants Clark & Punched were before the issuing of the prospectus and notice hereinafter mentioned well aware of the said contract; and the defendants after the making and entering into of the said contract, and after the passing of the Companies Act, 1867, and after the 1st of September, 1867, knowingly and fraudulently, and with intent to induce persons to take shares in the company, issued and caused to be published a prospectus of the company and a notice inviting persons to subscribe for shares in the company, which prospectus and notice did not nor did either of them specify the dates and names of the parties to the contract; and the plaintiff, on the faith of such prospectus and notice respectively, took shares in the company, and paid to the company a large sum of money in respect thereof; and the plaintiff had no notice of such contract, then being a

contract within the meaning of the 38th section of the Companies Act, 1867; and the shares were and are of no value to the plaintiff, and he has lost the moneys he so paid to the company. Claim £1,000.

The defendant Grant and the defendants Clark & Punchard severally pleaded not guilty and a traverse of every material allegation in the declaration. Issue thereon.

There were eighty-seven other actions brought against the same defendants by other persons who like the plaintiff had been *induced to become purchasers of shares in the [474 Lisbon Steam Tramways Company upon the faith of the prospectus issued by the company. The aggregate amount of the claims in these several actions was about £36,000. In one only of these eighty-seven actions, viz., *Miller v. Grant and others*, had a statement of claim been delivered, which charged fraud at common law as well as under the statute. The others had proceeded no further than writ, when (on the 23d of February, 1876) the following consent was given by the respective solicitors for the defendants in the eighty-seven actions: "We do hereby consent that the time limited for the respective plaintiffs in all the above actions to deliver statements of claim be extended until one month after final judgment shall be entered in the action of *Twycross v. Grant and others*. This consent, however, to be without prejudice to any application the defendants may hereafter make, upon reasonable terms, in any one or more of the said actions, to compel the plaintiff or plaintiffs to deliver his or their statement or statements of claim at an earlier date. No order or orders to be drawn up upon this consent, unless required by one of the parties to one of the above actions."

The action came on for trial before Lord Coleridge, C.J., on the 28th and 29th of May, and the 7th, 11th, 12th, and 13th of July, 1876. Before the jury were sworn, the counsel for the defendants applied for a postponement of the trial, on payment of costs, and upon the terms of bringing the amount of damages claimed (£1,000) into court, in order to give the defendants an opportunity of entering into negotiations with the Portuguese authorities to obtain further concessions to re-establish the company; or, in the alternative, to allow the defendants to withdraw their pleas⁽¹⁾. The

(1) Order xxiii, under the Judicature Act, 1875, provides that "The plaintiff may, at any time before receipt of the defendant's statement of defence, or, after the receipt thereof, before taking any other proceeding in the action (save any

interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly dis-

475] *application was opposed by the plaintiff's counsel; and Lord Coleridge, C.J., declined to accede to it, on the ground that, this action having been put forward as a sort of test action in order to try the question or one of the questions common to all the eighty-eight actions, the trial of this action, in the preparation for which great expense had necessarily been incurred, must materially affect the trial of the others, and therefore it would be inexpedient in this manner and at this stage of the proceedings to interrupt the ordinary course.

The jury having been sworn, the defendants' counsel formally offered to consent to a verdict for the plaintiff for the amount of the claim in the declaration. This offer being rejected, the case proceeded, the counsel for the defendants intimating to the court that it was not their intention to appear for their respective clients or take any part in the trial.

The view of the facts taken by the judges respectively is given in detail in their judgments, and this renders a separate statement unnecessary.

At the close of the evidence for the plaintiff his counsel summed up the case. The defendant Grant then, in the absence of his counsel, addressed the jury and contended that there was no evidence to show that he or his co-defendants had been guilty of any fraud; that the contracts referred to in the declaration were not such "contracts entered into by the company, or the promoters, directors, or trustees thereof," as were required by s. 38 of the Companies Act, 1867, to be disclosed in the prospectus; and that, at all events, the defendants were guilty of no want of *bona fides* in assuming that they were not such contracts as the act required to be disclosed.

The defendants Clark & Punchard were not represented. No evidence was offered on the part of the defendants.

476] *Lord Coleridge, C.J., in the course of his summing up observed that it was necessary to determine whether

continued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the court or a judge, but the court or a judge may before or at or after the hearing of the trial, upon such terms as to costs and as to any other action and

otherwise as may seem fit, order the action to be discontinued or any part of the alleged cause of complaint to be struck out. The court or a judge may, in like manner and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out; but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave."

the contracts mentioned in the declaration were contracts entered into by the defendants as promoters, and whether they were intentionally concealed by them when they caused the prospectus to be issued; and he left the following questions to the jury:—

1. Were the contracts so mentioned made by the defendants?

2. Were the defendants promoters of the company at the time of making such contracts and of the issue of the prospectus?

3. Did they issue the prospectus?

4. Did they knowingly omit mention of these contracts from the prospectus?

5. Did the plaintiff take his shares on the faith of the statements in such prospectus?

6. If these contracts had been disclosed in the prospectus, or reference made thereto, would the plaintiff have taken the shares?

7. Had the plaintiff any notice of the existence of such contracts?

8. Were the contracts connected with the affairs of the company, and were they such that they were material to be known to a person about to apply for shares?

9. Did such contracts materially affect the interests of the company?

10. Was it known to the defendants, and was it the fact, that the company, when formed, would bear the burden of the payments to be made under such contracts, and that the sums to be paid under them would come out of the funds of the company?

11. Were such contracts made, and the fact of their existence intentionally suppressed in fraud of the company and of persons invited to take shares in the company?

The jury declined to answer the last question; and they answered the sixth and seventh questions in the negative, and all the others in the affirmative.

At the suggestion of the defendant Grant, Lord Coleridge, C.J., put this further question to the jury,—“Were the statements of the contracts withheld under a *bona fide* belief that by law those contracts need not have been set forth?” To this question the jury answered “Yes.”

*As to the measure of damages, Lord Coleridge, [477 C.J., told the jury,—“The plaintiff is entitled, if you think there has been fraud, to recover what that fraud has cost him. He is entitled to recover the real damage occasioned by the fraud. If you think the real damage occasioned by

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the fraud is the full amount of the shares, give him the full amount of the shares, namely, £700. If you think there is evidence which goes to show that the result of the fraud is not damage to the full extent of £700, then give him so much less as in your judgment the fraud has really occasioned him loss."

The jury assessed the damages at £700.

A verdict was thereupon entered for the plaintiff for £700, with leave to move to enter judgment for the defendants on the additional finding of the jury.

July 24, 1876. *Benjamin*, Q.C., for Grant, moved for a new trial on the ground that the findings on the second and third questions were against evidence. He submitted that the prospectus was issued by the directors of the company, and not by Grant or Clark & Punchard. Assuming that Grant drew it up and caused it to be circulated, still the persons who issue it, within the meaning of s. 38, after the company is formed and organized, are the directors. From that moment, the existence and functions of the promoter are gone (*). He also moved on the ground that the jury had not been properly instructed, or had misunderstood their instructions, as to the proper principle on which the damages were to be assessed, and that the finding of £700 was in excess of any damages allowed by law.

The rule was refused on the first point, but granted on the second,—the time for appealing against the decision of the court in refusing to grant a rule for a new trial on the question whether the defendant Grant issued the prospectus, and, if so, whether at a time when he was a promoter, within s. 38 of the Companies Act, 1867, being extended, so as to run only from the date of the final judgment of this court in the cause (*).

478] **Hawkins*, Q.C., obtained a similar rule on behalf of Clark & Punchard.

Morgan Howard, Q.C., also obtained a rule to extend the time for the plaintiff to move for judgment until the argument of the defendants' rules for a new trial; and that the time for the plaintiff to move for a rule *nisi* for a new trial, or to set aside the finding of the jury on the question suggested by the defendant Grant, be extended until after the argument of the defendants' rules.

Jan. 23, 1877. *Sir H. James*, Q.C., *Morgan Howard*, Q.C., and *H. Tindal Atkinson*, showed cause against the defen-

(*) See 7 & 8 Vict. c. 110, s. 3.

for appealing was obtained in the Court

(*) A like rule for extending the time of Appeal on the 2d of August, 1876.

dants' rules for a new trial. They contended that the contracts mentioned in the declaration were contracts made by the promoters, which materially affected the interests of the proposed company, and which were required by s. 38 of the Companies Act, 1867, to be disclosed in the prospectus; that these contracts were fraudulently, that is, intentionally concealed; that the evidence showed that the whole scheme was a fraud, the proposed tramways impracticable, the company a mere sham, the directors the creatures of the promoters, and the means resorted to in order to induce the public to invest their money in the purchase of shares disreputable in the highest degree; that the prospectus was issued without any inquiry by the directors or any one else as to the probability of the scheme being successful: that it was persisted in when the report of the company's own engineer showed it to be utterly worthless and impracticable; that this was not the case of a contract which could be rescinded on the ground of fraud, the contract to take the shares being with the company, as against whom the plaintiff could not repudiate the shares by reason of such fraud on the part of a promoter,—*Gover's Case* (1); nor could the plaintiff give back the shares to Grant, for Grant made no contract with him; that, but for the concealment of these contracts, the company never would have been floated, and therefore that concealment, for which the defendants were responsible, was the real cause of the damage sustained by the plaintiff; and that the shares never had any real value, and consequently the proper *measure of damage [479 which the plaintiff was entitled to recover was the amount of money which the defendants' fraud had caused him to part with.

Upon this part of the case the following authorities were cited: *Hill v. Gray* (2), *Borradaile v. Brunton* (3), *Powell v. Salisbury* (4), *Davis v. Garrett* (5), *Lee v. Riley* (6), *Hill v. Balls* (7), *Mullett v. Mason* (8), *Davidson v. Tulloch* (9), *Kennedy v. Panama and New Zealand, &c., Royal Mail Co.* (10), *Collins v. Middle Level Commissioners* (11), *Sneesby v. Lancashire and Yorkshire Ry. Co.* (12), and *Smith v. Green* (13).

(1) 1 Ch. D., 182.

(2) 1 Stark., 484.

(3) 2 Moo. J. B., 582.

(4) 2 Y. & J., 391.

(5) 6 Bing., 716.

(6) 18 C. B. (N.S.), 722; 34 L. J. (C.P.),

(7) 2 H. & N., 299; 27 L. J. (Ex.), 45.

(8) Law Rep., 1 C. P., 559.

(9) 3 Macq., 783.

(10) Law Rep., 2 Q. B., 580, 587.

(11) Law Rep., 4 C. P., 279.

(12) Law Rep., 9 Q. B., 263.

(13) 1 C. P. D., 92.

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Jan. 24. *Sir Henry James, Q.C.*, moved *pro forma* to enter judgment for the plaintiff; against which

Benjamin, Q.C., and *Cohen, Q.C.*, for the defendant Grant, and *Thesiger, Q.C.*, *C. Bowen*, and *R. E. Webster*, for the defendants Clark & Punchard, showed cause: There are hardly two judges who have taken the same view of the section in question; but all who have expressed an opinion upon it agree that some limitation must be put upon the words of the enactment. In *Gover's Case* (¹), which is the leading authority upon the subject, *James, L.J.*, and *Bramwell, J.A.*, were of opinion that the section does not invalidate contracts such as these, but is confined to contracts made "on behalf of the company," or contracts on which the company may be made liable by adoption or otherwise; and *Mellish, L.J.*, and *Brett, J.A.*, seemed to think that the contracts which are to be disclosed are contracts to the benefit of which the company is entitled, or contracts under which the company may be exposed to some liability beyond that which is expressed in the prospectus. The word "knowingly" in the act does not mean purposely or designedly, but wilfully and with intent to deceive or mislead. It cannot mean "knowing of the existence of the contract;" it clearly means knowing that it contains some-480] thing that it was *material to be disclosed to the public, and wilfully omitting with intent to conceal it. This the jury expressly declined to find against the defendants. It is not to be lost sight of that this 38th section is found in a division of the statute which is headed "Contracts," and follows a section which deals with how "contracts on behalf of the company" may be made. What more would the plaintiff have had to guide his discretion if the prospectus had contained "the dates of the contracts and the names of the parties to them?" The failure of the scheme was rather to be attributed to the mismanagement or misconduct of the directors in not making themselves acquainted with the difficulties in the way of carrying out the scheme, and in going on with it after they had ascertained that it was impracticable, than to concealment of these contracts.

As to the damages,—The undertaking being according to the plaintiff's own contention utterly impracticable and the shares worthless, he could not have sustained any damage by the concealment of which he complains. He intended to buy shares in a company such as that described in the prospectus, and he bought shares worth less than they would

(¹) 1 Ch. D., 182.

have been worth if the concealed contracts had not been entered into. The utmost measure of damage, therefore, which he could be entitled to, if any, would be the loss which was the natural and necessary result of the defendants' concealment; or the difference between the value of the shares supposing the whole £309,810 were going to be spent on the works, and their value if the capital were reduced by the sums mentioned in the concealed contracts; or the difference in value of the concern when the plaintiff bought his shares, less the sums last mentioned. Where the contract is not rescinded, the person who has been induced by a fraud to enter into it cannot recover as damages more than the difference between the value of the thing he intended to buy and that of the thing which he actually got: *Sedgwick on Damages*, 7th ed., 591, 592.

[The following cases were also referred to,—*Swinfen v. Bacon* ('); *Udell v. Atherton* ('); *Chinery v. Viall* ('); *Keates v. *Cadogan* ('); *Cornell v. Hay* ('); *Charlton* [481 *v. May* ('); *Venezuela Ry. Co. v. Kisch* ('); *Oakes v. Turquand* ('); *Peek v. Gurney* ('); *Parker v. McKenna* ('); *Imperial Mercantile Credit Association v. Coleman* ('); *Gover's Case* ('); *New Sombbrero Phosphate Co. v. Erlanger* ('); *Craig v. Phillips* (').]

Jan. 26. *Sir H. James, Q.C., Morgan Howard, Q.C., and H. T. Atkinson*, with him), in support of the plaintiff's rule for judgment, commented upon the cases cited for the defendants, and referred to the following additional authorities: *Reynell v. Sprye* ('); *Smith v. Kay* ('); and *Reg. v. Prince* (').

Cur. adv. vult.

Feb. 12. The judgment of the Court (Lord Coleridge, C.J., and Grove and Lindley, JJ.) was delivered by

LORD COLERIDGE, C.J.: This case was tried before me at Guildhall on various days between the 26th of May and the 13th of July in the year 1876. A verdict passed for the plaintiff for £700; and the jury answered a number of questions, which, as the argument is recent and the facts are

(¹) 6 H. & N., 184, 846; 30 L. J. (Ex.), 368.

(²) 7 H. & N., 172; 30 L. J. (Ex.), 337.

(³) 5 H. & N., 288; 29 L. J. (Ex.), 180.

(⁴) 10 C. B., 591.

(⁵) Law Rep., 8 C. P., 328.

(⁶) 31 L. T. (N.S.), 437; 23 W. R., 129.

(⁷) Law Rep., 2 H. L., 99, at p. 120.

(⁸) Law Rep., 2 H. L., 325.

(⁹) Law Rep., 6 H. L., 377.

(¹⁰) Law Rep., 10 Ch., 96.

(¹¹) Law Rep., 6 H. L., 189.

(¹²) 1 Ch. D., 182.

(¹³) 5 Ch. D., 73.

(¹⁴) 3 Ch. D., 722.

(¹⁵) 21 L. J. (Ch.), 633.

(¹⁶) 7 H. L. C., 750; 30 L. J. (Ch.), 45.

(¹⁷) Law Rep., 2 C. C. R., 154.

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fresh in our memory, it is not necessary here to repeat. The plaintiff and defendants alike moved for judgment; and the question on these cross motions is whether the verdict for £700 can stand altogether or in part.

The plaintiff was an allottee of shares in the Lisbon Tramways Company, of which, for the purposes of this discussion, it must be taken that the defendants were promoters. The defendant Mr. Grant was what is called the financier of the company; the defendants Messrs. Clark & Punchard were the contractors.

It was proved that the contractors had at first agreed to make a line, speaking in round numbers, of 130 miles in length for a sum of £304,000; but the scheme in this shape 482] and for this number of *miles never reached the public. The scheme of which the prospectus was issued, and on the faith of which prospectus the plaintiff bought his shares, was for making a line 68 miles only in length for the sum of £309,000. Substantially, the difference between the smaller contract for the larger number of miles and the larger contract for the smaller number of miles was made up by two sums which the contractors agreed to pay to Mr. Grant and to the Duke of Saldanha, the chairman of the company, respectively; by two contracts, the existence of which was not disclosed in the prospectus, and was unknown to the public, and to the plaintiff, as one of the public, when he bought his shares. The plaintiff contends that the withholding of these contracts in the prospectus renders it fraudulent on the part of the defendants as promoters, and entitles him, as a shareholder, to recover from them the money he has lost, viz., the price of the shares, as damages caused to him by the fraudulent prospectus.

Two main questions arise and were discussed in the argument before us,—1. The action being brought distinctly and only upon the 38th section of the Companies Act, 1867 (30 & 31 Vict. c. 131), does it lie at all? or, in other words, are the contracts set out in the declaration within the words of the statute just mentioned? 2. Were the damages awarded by the jury founded on a wrong principle, and therefore excessive?

The section, the language of which it is necessary carefully to consider, is as follows: "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice,

whether subject to adoption by the directors, or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

Some limitation, it is plain, must be put upon the very general words "any contract," which in their full grammatical sense would include a contract made by a [483 promoter on his own personal behalf, and without any reference whatever to the affairs of the company. This cannot be the true construction of the statute. What, then, was the object of the statute? because according to that object, if it can be according to legal principles discovered, the language must be interpreted. Now, the general nature of the frauds to which applicants for shares in companies are a prey, and the necessity for special legislation to protect them, will be best understood by examining the respects in which applicants for shares differ from purchasers of other kinds of property, and the dangers to which such applicants are more particularly exposed. All purchasers equally run the risk of buying a comparatively worthless article, and of being misled by untrue representations as to its nature and value; and from risks of this kind no special legislation was necessary to protect shareholders. The value of a share in a company, however, depends not only on those circumstances which regulate the value of all salable commodities, but also on the persons by whom and the mode in which the capital of the company is to be dealt with. It is utterly immaterial to an ordinary purchaser to know what the vendor will do with the purchase-money when he gets it: the purchaser has no further interest in it. But an applicant for shares in a company is in a totally different position. His money becomes part of the capital of the company; and to him it is all important to know what sort of persons are to have the control of his money when he has paid it, and how that money is to be applied, whether upon the enterprise itself or in remunerating, perhaps with lavish extravagance, those who have brought the company into existence. Again, it is all important for him to know whether shares applied for by other people are applied for honestly, as by himself, or by persons whose only object is to create a factitious demand for the shares, and to get rid of them as soon as they have succeeded in deluding others to take them on the faith of their apparent value.

Now, these are all matters which promoters may arrange for their own benefit, and keep entirely out of sight: and it is notorious that by taking advantage of their opportunities in this respect promoters have committed gigantic frauds.

The investigations which have brought the frauds to light 484] *have shown that there are certain methods commonly in use by promoters to induce persons to take shares in worthless schemes, and to supply the means by which promoters can enrich themselves. Some of these methods are the following: To put forth a prospectus giving a glowing description of the enterprise, omitting everything which if known would show it to be worthless,—to enter into agreements by which the company should become bound to pay large sums of money to the promoters,—to make arrangements for obtaining the command of a large number of shares in the company, so as to control the disposition and market price of such shares,—to arrange that the promoters or persons friendly to them should become directors of the company. Of these methods the first was seldom resorted to alone; and, if it were, the law relating to fraudulent prospectuses was sufficient for all practical purposes.

But the frauds perpetrated by means of concealed agreements, which were the most common, were also the most difficult to deal with. Their non-disclosure by no means necessarily made a prospectus fraudulent; and, unless the prospectus was fraudulent, the deluded shareholders were generally without redress. To defeat frauds of this kind some law was required to compel the promoters of companies to disclose all agreements entered into by them, and affecting their own remuneration by the company directly or indirectly, the price to be paid by the company directly or indirectly for the property the company was formed to take, the qualifications or independence of the directors, the issue or control of the shares of the company. Experience showed that it was by means of secret agreements relating to matters such as these that unscrupulous promoters succeeded in enriching themselves at the expense of their dupes.

In this state of things the 38th section of 30 & 31 Vict. c. 131 was passed. This at least appears from it: The persons to be protected are persons applying to a company for shares and contributing to its capital on the faith of its prospectus. The means of protection is the compelling those who issue a prospectus to disclose in it the dates and

names of parties to all contracts described in the section. The consequence of knowingly omitting to comply with the statute is to render the prospectus fraudulent on the part *of those who issue it, but not on the part of the com- [485 pany itself.

What are the contracts which must be disclosed? Contracts entered into, (a) by the company, or the promoters, directors, or trustees of the company, and (b) before the issue of the prospectus. The words "whether subject to adoption by the directors or the company, or otherwise," do not explain the *kind* of contract. This is to be ascertained from a consideration of the previous language of the section, and its real object. Some limitation, as has already been said, must be imposed; and it seems clear that the contracts which must be disclosed are contracts calculated to influence persons reading a company's prospectus in making up their minds whether or not they will apply for shares in it. Are there, then, any further limitations to be imposed upon the words describing the contracts to be disclosed?

It is suggested,—first, that only contracts imposing obligations on the company need be disclosed: but so to hold would leave applicants for shares still exposed to most of the frauds already pointed out; and, although all contracts imposing burdens on the company are clearly within the act, they are not in our opinion by any means all which were contemplated and struck at by it.

The argument derived from s. 37 and the heading "contracts" prefixed to ss. 37 and 38, and to the effect that the contracts in s. 38 must be contracts binding upon the company, is by no means satisfactory or conclusive. Sect. 37 was inserted to cure an oversight in the Companies Act, 1862, and to show by what contracts companies registered under that act are to be bound, and is complete in itself. Sect. 38 relates, it is true, to contracts; but its primary object is the prospectus; and it is not confined, at least in terms, to companies formed or registered under the Companies Act, 1862, but extends, at least in words, to all joint stock companies of whatever description.

It is suggested, secondly, that only contracts entered into by the company or by its promoters, directors, or trustees, *as such*, are within the enactment: and this is the view adopted by Bramwell, B., in *Gover's Case* ('). But this again would be, in our opinion, too narrow a construction. In fact, nothing would be *easier than to evade the act [486

(') 1 Ch. D., 182.

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altogether, if the words "as such" are imported into it. As pointed out by Lord Justice Mellish in *Gover's Case* (1), all that would be necessary to evade the act would be, to enter into a contract first, and to become a promoter afterwards.

Conceding, therefore, that the contracts to be disclosed must in some way affect the internal or external affairs of the company, including in that expression its property and prospects, the management of its affairs, and dealings with its shares, we think the kind of contract to be disclosed ought not to be limited in the way suggested.

A statute passed to prevent fraud, and couched in general language, ought to be construed so as to defeat all the frauds which are within the mischief sought to be remedied; and the general language of the statute ought not to be cut down so as to leave perhaps the larger portion of such frauds entirely undefeated. It may be inferred that the words of the act were purposely left as general as possible, in order to throw as wide a protection as possible over those for whose benefit the act was passed. Nor is it necessary for us to do what the Legislature has declined to do, viz., define positively and negatively the exact kind of contract which must be disclosed, and the exact kind of contract which need not. Suffice it to say that any construction of the act which would exclude from its operation a contract entered into by a promoter before its prospectus was published, and affecting his own payment out of the funds of the company, or the property of the company, or the manipulation of its shares, or the independence of its directors, would be too narrow a construction, and ought not to be adopted.

We have said already that the words "whether subject to adoption by the directors or the company or otherwise" do not appear to us to be so important as the defendants' counsel contended that they were. But we cannot assent to the construction attempted to be put upon them, and to construe "or otherwise" as meaning "or otherwise adopted." Such a construction would make the words themselves almost if not entirely superfluous. It is not easy to suggest how a
487] contract by a promoter on behalf of a *company before a company existed could be made otherwise than subject to adoption by the company itself,—yet contracts by promoters not subject to such adoption, and concealed from the company, are the commonest and most mischievous form of the frauds which, as we think, the statute was intended to defeat. If we have rightly construed the act of Parliament, the mere reading of the first contract is suffi-

(1) 1 Ch. D., at p. 191. •

cient to show that, if the defendants were promoters, it is clearly one which the act compels to be disclosed. And, as to the second, it is enough to point to the provision that the Duke de Saldanha is not to receive his money unless the defendants Clark & Punchard obtain the contract for the works. Both parties to this contract had a direct interest in getting up the company altogether irrespective of the probabilities of its ultimate success. We are of opinion that these two contracts are within the words of the section, and that as against the defendants their suppression gave a right of action to the plaintiff on this prospectus, unless we are precluded from so holding by authority, which we proceed to inquire.

Cornell v. Hay (1), in the Common Pleas, and *Charlton v. Hay* (2), in the Queen's Bench, are clearly in accordance with the view above expressed. Lord Chief Justice Cockburn, in *Charlton v. Hay*, at nisi prius, is said to have taken a different view of the act: but there is no authentic report of his observations; and, if he did take the view ascribed to him, and use the expressions which have been quoted to us, he must, we think, have for the moment overlooked the essential difference between a buyer of ordinary property and a person applying to a company for a share in its capital. Be this, however, as it may, what fell from the Lord Chief Justice at nisi prius cannot in this court be taken to overrule the decision of the court in banc.

Gover's Case (3), curiously enough, is claimed both by the plaintiff and by the defendant to be conclusive in his favor. The points actually decided in that case were that, even in cases within the enactment, the shareholder could not repudiate his shares. It was also decided by the Lord Justice James and Bramwell, B., that the contract there in question was not within the act: but the reason for this part [488 of their decision was, that the alleged promoter, Mappin, who made the contract, was not a promoter of the company, or at all events that he was not a promoter, director, or trustee of the company at the time the contract was entered into. This reason, however, was not concurred in by the other members of the Court of Appeal. So far, therefore, as the actual decision in *Gover's Case* (3) is concerned, it does not touch this case; for, we have to consider it upon the assumption that the defendants were promoters when the contracts which we have alluded to were entered into.

The *New Sombrero Phosphate Co. v. Erlanger* (4) turned

(1) Law Rep., 8 C. P., 328.

(2) 31 L. T., 437.

(3) 1 Ch. D., 182.

(4) 5 Ch. D., 73.

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entirely on general principles of equity, not on the section of the statute with which we have to deal: and *Craig v. Phillips* ⁽¹⁾ only decided that it is not incumbent on a mere vendor of property to a company to disclose what he gave for it. Neither of these decisions in any manner conflicts with the conclusions at which we have arrived. At the same time, it is impossible not to see that the Lord Justice James and Bramwell, B., put upon the act a construction much narrower than that put upon it by the Court of Queen's Bench in *Charlton v. Hay* ⁽²⁾, and by the Court of Common Pleas in *Cornell v. Hay* ⁽³⁾, and narrower than that which we have endeavored to show is its true construction. But Lord Justice James, and Bramwell, B., do not appear to have decided that the act does not apply to such contracts as those with which we have here to deal, if entered into by persons who were promoters at the dates of the contracts: and the balance of authority is against such a conclusion. The balance of authority appears to us to be at present in favor of the view that the object of the Legislature was, to prevent the concealment of contracts with promoters, &c., which it might be material for applicants for shares to know. The contracts in this case, as we have already said, and the verdict of the jury show conclusively that if this test is to be applied the contracts ought to have been disclosed in the prospectus.

But then it is urged that this action will not lie against 489] the *defendant Grant, as he *bona fide* believed that the contracts in question need not by law have been set forth. This *bona fide* belief, however, is perfectly consistent with a full knowledge of all the facts and an erroneous opinion respecting the law applicable to them. As he knew of the prospectus and of the contracts, and as he issued the prospectus knowing that it did not allude to those contracts, the statute applies to him, whether he did or did not take a correct view of the law.

With respect to the damages, we think the verdict ought not to be disturbed. The principle we apprehend to be that the plaintiff is entitled to recover whatever damages he has sustained by reason of the fraud of the defendants. By the fraud of the defendants he was induced to pay £700 for seventy shares in this company, and the whole of that money has been lost. That loss was the natural consequence of the acquisition and retention of shares in such a company as this.

It was indeed contended that £700 could not be right, as

⁽¹⁾ 3 Ch. D., 722.

⁽²⁾ 31 L. T., 487.

⁽³⁾ Law Rep., 8 C. P., 328.

the defendants were at all events entitled to be credited with the market price of the shares when the plaintiff bought them; and reference was made, in support of the defendants' contention on this point, to Sedgwick on Damages, p. 556, and to Lord Campbell's observations in *Davidson v. Tulloch* (¹). No doubt, if the shares were really worth anything when bought, the defendants ought to have credit for what they were really worth. But the fact that they were quoted at a premium on the Stock Exchange is only evidence of value, not proof of it; and, if the jury thought (as they well might, and probably did,) that the quotation on the Stock Exchange did not show a real, but only a delusive value caused by the fraudulent nature of the prospectus and the mode in which the shares were manipulated by the defendants and others in concert with them, the jury were not only justified in disregarding, but were bound to disregard, such delusive and factitious value; although, of course, if the plaintiff had sold his shares, he must have credited the defendants with whatever he might have realized by the sale.

There is no evidence whatever that the shares ever had any value except that which resulted from the wrongful acts of the *defendants; and it would be contrary [490 to all principle to allow them to take advantage of their own wrong, and claim credit for the market price of the shares, when but for their own concealment of the contracts in question there is no reason to suppose that the shares would have had any market value at all. The defendants are not entitled to say to the plaintiff, "You might have sold your shares to some one as ignorant as yourself, or to some speculator in shares." The plaintiff was not bound to sell; and, after he discovered the fraud, he could not sell.

It was also contended that the property of the company had a value, and that the plaintiff's loss was really attributable to the conduct of the directors in not making the best of that property. But the question is not what was the value of the concessions and plant of the company, but what was the value of the shares got by the plaintiff; and it is evident that the jury treated them as worthless.

It was further contended that, as Grant urged the directors to return the capital to the shareholders when it was intact, he cannot be responsible for its ultimate loss. But he cannot absolve himself from the consequences of his own liability under the statute by showing that those con-

(¹) 3 Macq., 783, 790.

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sequences might have been averted by persons over whom the plaintiff had no control. It was by his fraud that the directors had obtained the command of the capital of the company; and, in acting as they did, they were acting within their powers as conferred by the memorandum and articles of association of the company. Whatever they did acting within their powers was, so far as it affected the plaintiff, a consequence of his having become a shareholder, and a consequence for which the defendants are responsible.

It was further contended that the true measure of damages is, the difference between the value of what the plaintiff intended to get and the value of what he did in fact get.

Adopting this principle, two results were contended for. First, it was said that the plaintiff intended to get shares in a company such as that described in the prospectus, and he got shares worth less than they would have been worth if the concealed contracts had not been entered into; and that the utmost measure of damage is, the diminished value of 491] the shares consequent on the payment out of *the capital of the company of the sums mentioned in the concealed agreements. Secondly, it was argued that as, according to the plaintiff's own contention, the company's undertaking was impracticable, the shares which he really intended to get were worthless, and that consequently he had sustained no damage at all by reason of the concealment of which he complains. But, in our opinion, the defendants are not entitled to avail themselves of the fact that the plaintiff intended to take shares in such a company as that described in the prospectus, or in the company unaffected by the concealed contracts. That intention was itself the result of the wrongful act of the defendants; and, as between the plaintiff and them, he is entitled to repudiate any intention of his own based on their fraudulent concealment. He is entitled to say that, but for their fraud, he would never have parted with his money. He has parted with it for shares as to which there was abundant evidence that they never had any real value at all; and his loss is the direct consequence of the defendants' conduct in issuing the prospectus. His slight and temporary profits hardly equal the ordinary interest of his money; and we think, therefore, there is no reason for disturbing the verdict of the jury either wholly or in part.

For these reasons, our judgment will be for the plaintiff.

Judgment for the plaintiff.

The defendants appealed.

May 7, 10, 11, 14, 15, and 17. The defendant Grant appeared in person.

Thesiger, Q.C., and *C. Bowen*, for Clark & Punchard.

Sir H. James, Q.C., *Morgan Howard*, Q.C. (*H. T. Atkinson* with them), for the plaintiff.

The arguments sufficiently appear in the judgments of the court. The cases cited were the same as in the court below.

Cur. adv. vult.

June 2. The following judgments were delivered.

BRAMWELL, L.J.: Matters have been introduced into this case which are wholly irrelevant; matters which have absolutely *nothing to do with the questions we have to [492] decide. Reluctant as I am to deal with subjects not properly involved in the case in hand, it is nevertheless necessary I should speak of some of the things I have referred to, in order to show they have no bearing on the questions before us, and in order to show I am not insensible to their intrinsic importance. I shall speak of the persons concerned as if they were unknown to me by name even, and I speak of the directors with all reserve. They are not before us, and if they were, might very much alter the case suggested against them. The facts before us are these: the Duke de Saldanha, a Portuguese nobleman, ambassador to this country, had a concession of powers to make and work tramways from Lisbon to other places. This concession, from motives of interest, or patriotism, or both, he was desirous of selling to some person or company who would buy it and make and work the tramways. To accomplish this wish he applied to the defendant Grant as a person who would assist him. The defendant Grant applied to the other defendants, Clark & Punchard, contractors, and persons whose business it was to make such tramways. The arrangements come to after various negotiations were as follows: that a company should be formed with a share capital of £200,000, and a borrowed preferential capital of £150,000; that Clark & Punchard should contract with this company to make and deliver to it two lines of tramway to Cintra and Torres Vedras in working order, with proper stations and with necessary locomotives and working stock, and with all preliminary expenses paid, for the sum of £309,810. So that the company would have its line in working order, with the necessary plant, and a capital of £40,190 wherewith to work it. Clark & Punchard also were to agree with the company to guarantee two years' interest on the capital. This was to be the agreement with the company

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when it came into existence, but of this' £309,810 Clark & Punchard were to give the duke £22,000 in money and shares, they were to give one Larmanjat, for the right to use his patent, about £7,000, I believe, and they were to give Grant £45,800 for services rendered and to be rendered in and about obtaining for them, Clark & Punchard, a contract "upon such terms as should be satisfactory to them," and in the formation of the company and preparation of, 493] advertising *and making public the prospectus, raising and placing the capital. It was also agreed that, if required by Grant within thirty days of the first allotment of shares, Clark & Punchard should take from him not exceeding 4,200 shares at par. It is in respect of the not setting forth in the prospectus of these two contracts, viz., the one between Grant and Clark & Punchard, and the other between the duke and Clark & Punchard, and the alleged damage therefrom, that this action is brought. It may be added that Clark & Punchard were to qualify the directors, that is to say, to transfer to them or give them the price of shares free of expense to such an amount as to qualify them to be directors. The cost of this was estimated at £6,000. So that Clark & Punchard would pay to the duke, 22,000; to Larmanjat, £7,000; Grant, £45,800; in interest, £32,000; in directors' qualification, £6,000; in all £112,800, leaving them out of the £309,810 the sum of £197,010: from this, however, must be deducted what they might lose under their agreement with Grant to take the 4,200 shares at par. This loss amounted to £10,000, leaving therefore net about £187,000 as to costs of the tramways and plant. There is no suggestion that the price paid to the duke was unfair, except this, that the thing turned out worthless, and that no inquiry worth speaking of was made to see if it was worth anything; there is no evidence that the price to be paid to Larmanjat was excessive; as to the £32,000, the shareholders were told they were to have that amount of interest from the contractors, and therefore, with the least thought, must have known that it came out of their pockets to be returned to them; as to the payment to Grant, he says it was not excessive, and it may not have been, supposing it was right to buy and render such services as he rendered. As to the cost of qualifying the directors, nothing can be said to extenuate it, except that honorable men have been parties to such transactions, though not seeing their, to me, obvious impropriety. The impropriety of being nominees of sellers and at the same time agents of buyers, a thing the impropriety of which I had occasion to point out as long as

thirty-five years ago, with a warning that it might bring the parties to it within the law of conspiracy. Still, obvious as it is to people who will reflect on the matter, it seems not to be *generally appreciated. But to go on with the nar- [494] rative. Directors were found, mainly if not wholly I believe by Clark & Punchard, they were qualified subsequently, but they became directors originally, no doubt, with a promise that they should be so qualified, and a knowledge that unless the company was floated, or whatever it may be called, they would not get their qualification. That followed which might be expected. The directors were brought into existence, as such, to enter into a contract for the company prepared ready for their signature. Of course they did that which they were created for, doubtless trusting to their creators that it was "all right." They signed the contract pledging the company to pay Clark & Punchard £309,810, and they did so, as far as we know, without any inquiry as to how that sum was got at, whether the concession was worth having, what were the prospects of traffic, what was the nature of the country, what was the character of Larmanjat's process. It is idle to talk of the duke's knowledge of his own country, and of the municipal returns. It may be said safely that, as far as we know, the directors omitted to do everything that prudent agents of their principals the vendees, the company would have done, and which it is difficult to suppose they would have omitted if they had been venturing their own money in the matter. No better proof can be given than that near half the line included in the price £309,810 was abandoned, and a new line substituted wholly different except as to one terminus, Cintra. And this was done at once on the report of Mr. Trevithick, the engineer, who was sent out after instead of before the contract for the £309,810 was signed. No doubt, as Mr. Thesiger said, it does not follow that the original scheme was bad because the second was better; but the abandonment of the first for the second at once on the report of the engineer directly he saw the place, and the terms of the report, are the strongest evidence of the improvidence of the directors and that the first scheme was bad. And, without wishing to promote litigation, I cannot help saying I think they would be in great danger if sued by the company for breach of trust and duty in making the contract they did, and as they made it, and for going on with the scheme, especially in connection with what I am about to state. The defendant Grant *went into the market [495] and bought a large number of shares, and various news-

papers were induced, by payments to subordinate persons, to write favorably of the company. The shares rose to a premium; the public were attracted, and subscribed for the capital or a large part of it, both shares and debentures. The defendant Grant attempted to justify giving this false appearance of value to the shares, by saying that it continually happens that shares are made to appear worth less than their real value by people selling them when they have not got them. There are two answers to this: first, there is no reason to suppose that any such practice was apprehended by the company; next, that it cannot be right to counteract such a proceeding in the way here adopted; and, indeed, further, if it is believed that a scheme is a good one, and people try to depreciate it by selling its shares, they will be countermined honestly, and not by a trick, by those who think well of it buying the shares so sold. It must not be supposed I think that the defendant Grant is the only one who ever did this, I know it is often done, and is always wrong. To go on, however, the report of the engineer came in. The defendant Grant, creditably to him (indeed it is the only thing I can find in this case to approve of), recommended on the coming in of that report that the scheme should be abandoned; but, if true, marvellous to say, the directors, though they thought it ought to be abandoned, went on with it because there had been dealings on the Stock Exchange which would become null unless a settling day was appointed, and a settling day could not be named unless the directors went on with the scheme. So that for this reason they continued what they believed was likely to turn out ill for the shareholders. It did turn out ill. The tramway was worked for twenty-two months at a loss, then stopped; and an order made for winding-up the company, which stands now in debt on its debentures £150,000, and with no assets but what its rails and plant may sell for, unless, indeed, its right of action (if any) against its directors may be called assets. I may mention (to show I have not forgotten it) that when the first route to Cintra was abandoned and a new one substituted, the duke, Larmanjat, Grant, and Clark & Punchard all gave up a part of their expected profits; so that the line, shorter indeed, but more 496] expensive to *make, might still be made, with its plant, &c., for the contract price of £309,810. I have stated these facts, but I repeat they are wholly irrelevant. For though the sum to be paid to the duke had been fair, as perhaps it was, and that to Larmanjat, and the sum to be paid to Grant had been £500 only, a bare return for the ex-

pense of advertisements, and though he had not been bound to lay out a shilling in raising the price of shares and in bribing the press, if the price to Clark & Punchard had been fair, if the directors had subscribed their own money, if the scheme had been a good one and carefully considered, still, according to the argument for the plaintiff, the contract between Clark & Punchard and the duke, and the contract between Clark & Punchard and Grant to pay him the supposed £500, ought to have been stated in the prospectus. Nor can it be said it was necessary to show the actual facts, because if they had been as I have supposed the plaintiff could not have said, as he did, that knowing such reasonable contracts would have prevented him taking the shares, because we have no question before us as to whether he was influenced or not,—that has been found in his favor.

Having finished with what is not relevant, I will now address myself to what is. The first question is, whether the two contracts mentioned in the declaration are contracts within s. 38 of the Companies Act, 1867. The question is the same as to each. If one is within the section and not the other a difficulty might arise. For the plaintiff has sworn, and the jury have found, that if the two had been stated, the plaintiff would not have taken his shares, the jury have not found that if either one had been stated he would not. However, in my judgment this is immaterial; as if either contract is within s. 38 so is the other. I will not quote Mr. Buckley's (') vigorous remark on this section as I do not think it desirable for those who have to administer the law to speak disrespectfully of it, a thing, as Lord Coleridge said, more often done as to acts of Parliament by those who have not had, than by those who have had to do with the framing of them. But it is admitted on all hands that some limitation must be put on the words of s. 38, and undoubtedly the Legislature have imposed a difficult task *in having to say what, on those who have to admin- [497] ister the law. It is a task very nearly that of legislating. The section in terms comprehends "every contract entered into by the promoters before the issue of the prospectus" without limitation of antecedent time or subject, and would therefore in terms include a contract made twenty years before for taking a dwelling house in which the promoter had lived since. This cannot be; there must be some limitation. Two have been suggested. One by the plaintiff, viz., that every contract is meant which would assist a person in determining whether he would be a shareholder; the

(') Buckley on The Companies Acts, 1862 and 1867, 2d ed., p. 482.

other that only those contracts are meant which affect the company, which put an obligation on it, whether with or without some benefit attached. There may be other limitations better than either of them, but I think the choice lies between the two, and I am of opinion that the latter is right. I see no reason for the former. I think it is enough to let the public know on what terms they can have the subject-matter of the scheme they are invited to join. I think that if a mine is offered for purchase it is immaterial when and how the proposed vendor got it. No doubt if he got it cheap it would show that his vendor had not a high opinion of it, but its intrinsic value would be the same. Such an argument as this would lead to legislation that the prices paid for the last century should be stated. Such a construction of this section would make it a matter of prudence to state every contract that a promoter had at any time been party to. It is true that if a contract obviously immaterial were left out, no jury or tribunal ought to find a shareholder would have been influenced by its being mentioned, but who would risk this? Extravagant cases may be put, but prudence would require that the dates and names of the parties to every contract a man had ever entered into should be stated. I do not want to create a smile, but suppose a director of the company engaged to be married to the daughter of a promoter, and his reason for becoming a director was his wish to stand well with his intended father-in-law. Is the contract of marriage to be stated? If the father has agreed to settle money on his daughter is that to be stated? Why not? A shareholder might truly say, if I had known these things I should have known that the director had a motive for joining the scheme other than his 498] good opinion of *it. I trusted to his unbiassed good opinion of it, and took shares accordingly, and would not if I had known of their intended marriage contract, and he might be believed. Suppose a contract by one director to indemnify another perfectly *bona fide*. Is it to be stated? But in like way it might influence intending shareholders. Every sub-contract with Clark & Punched must be stated; five hundred contracts with workmen and with those who supply materials; so of all sub-contracts by the directors. So of all contracts for advertising, stationery, &c. Take this very case. The plaintiff in his evidence said that the mention of the name of the defendant Grant would have influenced him. A man is not bound to be a shareholder, and if he does not like the information given, need not be. He may ask as he might have asked here, How have you got at

the price of £309,810, and if not answered, or the answer not satisfactory, might have declined the shares. I know that practically this is not done. I think it is better to teach people to look after themselves, and not have this sort of paternal legislation taking care of them and giving them information they will not take the trouble to ask for.

It has been said that to the intending shareholder it is all important to know what sort of persons are to have the control of his money when he has paid it, and how that money is to be applied, whether upon the enterprise itself or in remunerating, perhaps, with lavish extravagance those who have brought the company into existence. Again, it is all important for him to know whether shares applied for by other people are applied for honestly as by himself, or by persons whose only object is to create a fictitious demand for them, and get rid of them as soon as they have succeeded in deluding others to take them on the faith of their apparent value. I feel bound to notice this on account of its force. But with all submission, are these objects attained by saying that, "contracts" shall be stated? To accomplish such objects ought not much more to be enacted? Would it not be necessary not only to state contracts, but anything that had been done by promoters, and persons not promoters? I think so. I construe the section, or endeavor to do so, and not legislate, or as little as possible. The construction I adopt leaves everything affecting the company provided for. Fraudulent statements in *the pros- [499 pectus were before provided against, and if the statements in the prospectus are untrue, and made without adequate inquiry, they would be fraudulent. This enactment guards against knowingly suppressing the truth. If in the contract entered into and stated there had been any breach of duty or trust in the directors; if they had entered recklessly into improvident engagements, as it is said they have here, they are liable to their *cestuis que trust* and principal, the company; if they have reserved benefits for themselves, they must give them up to the company. For instance, it may be they would be liable for the amount of their qualification which in reality comes out of the contract price.

Then the occasion of this act must be remembered, viz., the omission from the prospectus of a contract in the Overend & Gurney case which burdened the company. Further, I think this limitation of the enactment is much helped by its words. They are, "Any contract entered into by the company," that must be a contract binding on it; the next words are, "or promoters, directors, or trustees thereof."

Surely a contract entered into by trustees must mean as such, and so be a contract binding on the company. A similar observation is nearly as strong as to "directors." Then the only word left is "promoters," and the section can hardly mean contracts other than those they enter into as such; that is to say, binding on the company. That would make the statute speak of one class of contracts as to the company, its directors and trustees, and two classes as to its promoters. The words are in the plural, "promoters," "directors." I do not suggest that a contract intended to bind the company entered into by a single promoter need not be in the prospectus, but the use of the plural helps to show that the promoters as such were meant. Then the words, "whether subject to adoption by the company or directors, or otherwise," strongly confirms this. I believe they are intended to include contracts binding on the company or contracts which they have power to reject. Some strange remarks have been made about this. The matter is very clear. The company before issuing a prospectus may enter into a contract; that must be stated. Its directors or promoters may enter into a contract after or before it is formed, subject to adoption by the company. Such contracts must be stated. They must be stated, because though 500] *not binding at the time of the prospectus, they in all probability will become so by adoption after. The present case may give an illustration. If a prospectus had been issued on the first of July of the company it would have been necessary to state the contract of Clark & Punchard to make the line for £309,810, to which practically Clark & Punchard had bound themselves. Certainly if they had so agreed with the defendant Grant as a trustee for the company, though the company might have refused to adopt that contract. Again, the prospectus is "to be deemed fraudulent on the part of the promoters and directors" (in the plural), "and officers of the company knowingly issuing the same." It is impossible to say that this is levelled at the case of a contract between a promoter and a third person not affecting the same.

The issuing also refers to an act of the company. Suppose one promoter, having having given a director his qualification, gave him a prospectus. Could that be deemed an issuing of the prospectus by the promoters, so as to make the issuer of the single prospectus liable to a person who never saw or knew of the particular copy of the prospectus? What I mean is, that the section is speaking of the acts of the company and its promoters as a body, so of its directors

and trustees, and refers to contracts presumably within the knowledge of all, which would be contracts binding the company. Then there is the general heading "contracts" before s. 37, which must mean contracts binding on the company. On these grounds I have come to this conclusion. Of course, if the contracts are within the section they ought to have been stated, and if stated and understood must have influenced intending shareholders. As to the authorities, the judgment of Lord Justice Mellish in *Gover's Case* (1) seems to me to be to the same effect. He says, indeed, at p. 190, that "the object of the section was to prevent the concealment of contracts which it might be material for applicants of shares to know," but he explains that afterwards: he says that he does not agree with the whole of the reasoning of James, L.J. Now with what part does he differ? He says, "He thinks it too narrow a construction to exclude from the section cases where there was no fiduciary relation at the time of the contract, and that [501] it ought to be held to extend to every contract made with a person who afterwards becomes a promoter provided the company have become entitled to the benefit of the contract or liable to perform its provisions." The judgment of James, L.J., is also in favor of the conclusion I have come to. The whole tenor of his reasoning is that way, and his opinion is shown by the passage beginning, "I may illustrate . . ." that shows that in his opinion if the contract bound the company, or they were entitled to the benefit of it, it would be within the statute. The opinion of my Brother Brett is the other way, and so no doubt is that of the late Mr. Justice Honyman, an opinion which I may now say, I value most highly. He had the same point made before him as Mr. Thesiger has made before us, and founded his opinion on the same reasons as my Brother Brett in *Gover's Case* (1). As for the case of *Charlton v. Hay* (2), the best remark to be made on it is that the point made before us was not made there. For some reason, which may be guessed from the shorthand report as read to us by Mr. Thesiger, the case is not reported in the Law Reports or the Law Journal.

This, then, is the opinion I have come to. I do not advance it confidently. I do not think the question admits of a confident opinion, and I think those who express one cannot appreciate the difference between those cases where one may be formed and those where it cannot be. No question of principle, no question to be solved by industry and research

(1) 1 Ch. D., 182.

(2) 31 L. T. (N.S.), 437.

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exists. The question is, what limitation should be put on an enactment unlimited in words but necessarily requiring a limit in application?

It has been suggested that there is some fiduciary relation between Clark & Punchard or Grant, and the company, which may enable the latter to make some claim on Clark & Punchard, or Grant, or both; and, consequently, that even if only contracts affecting the company ought to be stated in the prospectus, that the contracts in question ought to be. I do not see any such case, certainly not as to the contracts with the duke; and, as if such case existed, the stating of those contracts would be the stating of contracts giving a benefit with no burden to the company, it would be difficult to suppose that the statute meant that the omission of *such contracts should be deemed fraudulent. If there is anything in this point it was not made at the trial, nor the opinion of the jury taken upon it. The verdict, therefore, could not be returned on this ground, and at the outside there should be a new trial that the plaintiff might make the point.

I do not apologize for this opinion, because I believe it to be the right one. But I am fully aware it is not likely to be the popular one; that would probably be to hold the section wide enough to comprehend these particular defendants and all transactions of a like nature.

I should rejoice if such nefarious transactions could be reached, proved, and prevented. Besides the loss of three hundred and fifty thousand pounds in this particular case, immense mischief has been done by practices such as these. It is the opinion of some of the ablest men of the day that the present stagnation of business is partly attributable to the want of confidence caused by the public knowledge of such cases as that of this company. But as is said in an able pamphlet which has been sent to me, "We must be careful lest righteous indignation against wrongdoers should lead us to throw the net too wide, and so make a snare for the honest and law abiding." I think I have shown that I have no approval of what has been done in the case of this company. But I must construe the act as it is, and not as I would have it in this particular case. The wrongdoers, indeed, ought not to escape. They can, in my opinion, be reached in a different way. On the other hand, it is frightful to think of the litigation and ruin there is in store for possibly perfectly honest persons if the construction contended for by the plaintiff is supported. The statute has existed for ten years. Thousands of companies have been formed,

and honestly formed, and prospectuses of them issued, in which there has been no mention of contracts not affecting the company. Many of these schemes doubtless have been unsuccessful. When there has been such omission from the prospectus, however honest, the parties to it are subject to actions in which they may indeed succeed, but also may fail.

Supposing that I am wrong, and that the contracts are within s. 38. Other questions arise; they arise on the rules moved for and obtained. There is no other complaint of misdirection, *or that the verdict was against evi- [503] dence, before us. First, I am of opinion that there was evidence that the defendants were promoters, and that they issued the prospectus "knowingly" within the statute. There is nothing to limit the word "promoters" to persons acting before the company is formed. It is not a word of art, it must be understood by lawyers as it would be by laymen. It is impossible to say that the defendants Grant and Clark & Punchard were not promoters of the company, at least till the share capital was engaged. Also, they issued the prospectuses, not any one particular prospectus, indeed, but the whole of them. They were jointly engaged: what the defendant Grant distributed were issued by the others, and so were what Clark & Punchard distributed. Mr. The-siger admitted that till the case was before us it was never objected that there was no evidence of an issue in fact by Clark & Punchard of the prospectus. Further, "know-ingly" does not mean fraudulently. If, therefore, the contracts are within the section, I am of opinion that these points fail the defendants, and that the judgment must stand.

The next question is the question of damages, and I am of opinion that there is not the least ground for a new trial on this head. If irrelevant topics were introduced by the plaintiff on this part of the case, topics equally irrelevant were urged in favor of the defendants. Fault was found with the judge for not assenting to the jury giving the plaintiff a verdict by consent. I think he was right. The very fact the defendants offered it and that the plaintiff objected was enough. It could do the defendants no harm. They could not be worse off than by a verdict against them. The complaint about extra costs is unfounded; I am by no means satisfied that the plaintiff is entitled to those of the trial as he needlessly caused them; and they would have been trifling had not the defendant Grant appeared in the course of the trial. Really the complaint is ludicrous. It is a complaint that the defendants have had an opportunity given them of complaining. They would have been no bet-

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ter off than they are, and would have been this worse off : that they could not have complained. The damages are less than the defendants were willing to agree to. On the question of damages I am of opinion the *verdict is right and should stand. The plaintiff's case is that the defendants omitted certain contracts in the prospectuses that they issued ; that if those contracts had been in the prospectuses he would not have taken shares. The jury believed this, and I have no doubt the plaintiff believed it, if not as to the contract, with the duke, certainly as to that with the defendant Grant. Of course I do not mean on account of his name. I treat him, as I said before, as a person I never heard of. But if it had been said there was a contract to pay a company-maker £48,500, to launch, or float, or finance the company—about one seventh of its capital—no one knowing that would have taken shares in it. But this being believed, the consequence follows that through what is deemed fraudulent on the defendant's part the plaintiff has taken shares. Then those shares turning out worthless, the plaintiff's damage is what they cost him. What is the answer to this? First, the argument of the defendant Grant, that if an earthquake had destroyed the line after profitable working for seven years, the plaintiff could not recover the amount he had paid, therefore neither can he now. But in that case the thing would not have been worthless through its intrinsic and inherent defect. Here it is. It is said no, it failed through mismanagement. There is no evidence of this. Then it was argued that as at the outside the contracts with the duke and Grant only amounted to £67,800, the injury to the company could not be more than that, and so the plaintiff's loss ought to be proportioned in some way. How does that touch the plaintiff's argument, that he would not have subscribed at all, but for the omission of the contracts? A remark of my Brother Brett was decisive. By a fraudulent statement that the takings of a business are £50 a week, a man is induced to buy it. It turns out that they are worth only £40 a week, and the business is worse than worthless. But it also appears that if the takings were £50 a week it would be worthless. Would the damages then be nought? The plaintiff says but for your fraud I should not have touched it. Then it was said that the plaintiff had extinguished the concern, or put it to death by petitioning for its winding up. It is wonderful. Any one would suppose that Winding up Acts ought to be entitled, "Acts for the more effectual ruin of companies and waste of 505] their assets." He had a right to *do what he did,

The proper tribunal made the order (not on his petition alone indeed) because it was right to make it, and therefore right to ask for it. And doubtless it was. The line was worked at a loss, and the longer the working the larger the loss. Then it was said that the shares could have been sold for 5s., or 10s., or something, each, and so his loss was not total. I think this was effectually answered by Sir H. James when he said that the plaintiff was not bound to sell his shares, that he had a right to see what the assets would realize. I put, again, the case of a horse fraudulently warranted sound, the seller knowing that it is not. The disease appears, and a man is willing to trust to the recovery of the horse and give £10 for it. The offer is refused, and the horse dies. Are the £10 to be deducted from the price? Impossible. Then it was said there might be some salvage. There was no evidence of any. And when it is remembered that there are preferential creditors to the amount of £150,000, it is impossible to suppose there will be anything for the shareholders, unless, indeed, the directors should be made to make good to the company the loss consequent on their adopting the scheme, agreeing to pay £309,810, and carrying it on when of opinion that it was bad—if it should appear that they have failed in their duty to their shareholders in these particulars.

I think I have gone through all the objections. I am of opinion that they all fail, that the right question was left to the jury on this head, and the right verdict found by them.

In the result, I am of opinion that judgment should be entered for the defendants, on the ground that the contracts are not within the statute. But on all other matters I am against the defendants, and think their appeal fails.

KELLY, C.B.: It appears to me upon the most attentive consideration of the numerous and complicated facts, which have been introduced into this case, that the action is altogether misconceived; that the contracts complained of are not within the act of Parliament, and that the fraud or frauds alleged to have been committed, and of which it may be that there is cogent evidence, are open to a remedy by a bill in equity, or possibly by an action at law, in which it may well be, that Mr. Grant and Messrs. *Clark & Pun- [506] chard, should be made defendants, but which should also include the directors as defendants, and in which ample redress might be obtained. As to the contracts, the suppression of which in the prospectus is complained of, it appears to me, that s. 38 of the act of 1867 has no application

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to them whatever; that a contract to be within the provision must have been made with the company, if it has been formed, and if not, with the promoters or the directors, or the trustees, representing or purporting to act on behalf of the future company, and with the intent that the company when formed shall execute a corresponding contract, and so in effect ratify the act done by the promoters, or other body of persons mentioned before its formation; also that it must be such as to impose, or to be intended to impose a burden, or obligation, or a loss, or a liability upon the company, which would affect the value of the shares in the hands of a purchaser.

It seems clear to me likewise, that no contract made between one promoter and another, or by or between any person or persons, and to which neither the company, nor one of the three bodies of persons mentioned in the clause are parties, can be brought within its operation. We must first consider the precise language of the section, and this appears clearly to contemplate that the contracts within it must be such as that the company itself shall become, or is intended to become a party to them, and that if entered into before the formation of the company, it must be made by the promoters, or intended directors, or trustees, as a body, and purporting to represent and to act on behalf of the company to be afterwards formed.

The words of the act are, "any contract entered into by a company or the promoters, directors, or trustees thereof." These words obviously apply only to the bodies of persons there mentioned, that is the company itself, or the promoters, or the directors, or the trustees thereof, who may represent the company or enter into any contracts on the company's behalf, and which if entered into before the company is formed are such as that, inasmuch as strictly speaking, the company cannot ratify a previous contract, yet corresponding contracts to the same effect may be afterwards entered into by the company, thus in effect ratifying the act of the promoters or other bodies of persons who had acted for 507] them before *their formation. The clause, therefore, does not refer to contracts by individuals though they may happen to be promoters, or directors, or trustees, the words being, "the promoters, directors, or trustees," in the plural number, without the addition of the words "or any or either of them." It is by such contracts only, that is, contracts entered into by the promoters as a body, or the directors, or the trustees, and to which, or to contracts to the same effect, the company itself afterwards becomes, or is in-

tended to become a party that the company can be in any way bound or subjected to any burden, or loss, or liability, or disadvantage, or the interests, or the value of the undertaking in any way affected, or the shares in the hands of the shareholders become of less value.

We may take the contracts between the company and Clark & Punchard, as an example. If this contract had been entered into between these contractors and the intended directors before the company had been formed, and as it could not be ratified by law by the company after its formation, they had entered into a corresponding contract as they have actually done, with the company, and this contract had been suppressed in the prospectus, it would clearly have been a fraud within the act of Parliament, as against the publisher of the prospectus: first, as having been a contract within the express words of the statute as made with the company, and having imposed a heavy burden and loss upon the company by their having become liable to pay £309,000 for works and concessions, and preliminary expenses of less value than the sum so payable, if in no other way by the £40,000 contracted to be paid to Mr. Grant, alleged or assumed to be for little or no service or consideration whatsoever. This would have been a contract within the express words of the clause, first, because it would have been made between the contractors, and the intended directors, and afterwards between the contractors and the company itself; and it would have been within the mischief of the statute, because it would have subjected the company to the loss or waste of the £40,000 before mentioned. But this contract which was a part and a natural part of the real fraud actually committed, was expressly mentioned in the prospectus, and therefore does not bring the case within the act of Parliament. And when we consider its terms and its full effect in connection with the multifarious *and [508 complicated facts of this case, it becomes obvious that on the one hand if it had been suppressed in the prospectus, it would have been clearly within the act of Parliament; having been disclosed, it at once opens to us the real fraud, of which it is a part, but a part only, and of which the shareholders complain in this action, and for which an ample remedy would have been found, if the case had been established in a suit in equity.

What then was that fraud? Certainly not the agreement by these contractors to pay the sum of £40,000 to Mr. Grant for little or nothing, and which the contractors alone had to pay, and upon which the company could never, under any

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circumstances, before or after its formation, become liable, or in any way injured or damnified; but the great and real fraud was the setting up as a body of directors, to whom the whole conduct of the affairs of the company was intrusted, whose qualifications were supplied to them gratuitously, and who regardless of their duties to the shareholders allowed themselves to be persuaded to enter into this contract for the payment of £309,000 of the company's money without inquiry or investigation by engineers, or other competent persons, of the value of the works to be performed, and without the slightest knowledge or attempt to obtain the slightest information as to how this large sum of £309,000 was made up, and consequently without discovering that £40,000 of it was to be paid to Mr. Grant for nothing, or next to nothing.

This fraud, however, this real grievance, upon which all the eloquence and rhetoric of the learned counsel for the plaintiff was expended for days together, is clearly not within the act of Parliament, because the contract was disclosed in the prospectus. But it is equally clear that if the works were not of the real value put upon them in this contract, and if the whole advantages resulting to the company from the contract were less by £40,000, or, as the plaintiff contends, by £70,000, than the price to be paid for them, the shareholders, as the aggrieved parties, would be entitled to complete redress, not by an action like this, but in a suit in equity against the parties, whoever they may have been, who put the directors in motion and conferred upon them the power to enter into this contract, and induced them to enter into it the very day after the formation of the company, 509] and, as before observed, *blindly and without inquiry, or any knowledge or information as to what it was for which they were engaging to pay this large sum of the company's money. And in such a suit the directors themselves must, of course, have been made defendants. But with respect to these contracts between the Duke de Saldanha and the contractors and the contractors and Mr. Grant, the company were not parties to them and were never intended to be made parties to them, and could not, by any possibility, under any circumstances have become liable to pay a single shilling of the £40,000 payable to Mr. Grant, or the £7,000 to Larmanjat, or the £22,000 to the Duke de Saldanha; and, further, if all the money had been paid to the last shilling to the duke and to Mr. Grant, it never could have been recovered back by the company or the shareholders, and the loss, if loss it be, must have fallen upon the contractors, and upon

them alone. If the company or the shareholders were indirectly damaged, their remedy must have been sought against the contractors. Whether the company had prospered or failed, whether the contract with Clark & Punchard was a mass of fraud and deception and helped to ruin the company or not, they, the contractors, alone were liable to pay these large sums to Grant and the others, and the company could never have been in any way affected by the payment or non-payment of any one or all of them. If these two contracts should be held to be within this clause of the act of Parliament, I do not see how any contractors with a company, perhaps, for the construction of a line of railway at an expense of half a million of money, can escape the obligation to disclose in a prospectus, or refer to every sub-contract they may have entered into for any quantity of materials, or of labor, or of anything else connected with their works, because they might have agreed to pay, perhaps, to some favored relative, an unreasonable or exorbitant sum of money for something purchased of him in order to perform their contract, but which would in effect be a loss to themselves and could not in any way fall upon the company. In what a condition would a fair and honest contractor be placed if this contract with Grant be within the act of Parliament. A contractor might also be a promoter, and might enter into a sub-contract with another promoter to pay him, in such a case as this, it might be £5,000, for having proceeded *to Portugal accom- [510]panied by an engineer, whom he had paid largely for his services, to survey the intended line. This he might honestly believe to be a reasonable sum, and it might really be a reasonable sum, but a jury might find it unreasonable, and perhaps on grounds unknown to the contractor; and upon this the contractor is to be made liable to every shareholder for the entire amount of the purchase-money of the shares and to be stigmatized with fraud, or, in other words, to be exposed to disgrace and ruin. Nor had this agreement for the £40,000 anything to do with the subsequent failure of the undertaking or the ultimate valuelessness of the shares. And it certainly appears to me that nothing but the widespread and all absorbing prejudice against Mr. Grant which seems to have possessed the minds of so many of those who have had to deal with this case could have led to the idea that the engagement for the £40,000, which was never performed (for a small portion only of the money was paid), had the slightest effect upon the interests of the undertaking, or in any way led or conduced to its subsequent depreciation

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or ultimate ruin. No doubt the large sums paid to Clark & Punchard may have assisted, together with the general mismanagement of its affairs, arising from the indifference and incompetence of the directors, and the difficulties in the construction of the line, and the selection of sites for the stations, in bringing about the overwhelming embarrassments and at last the falling to pieces of the company. But I repeat that neither the contract to pay, nor the payment of money by the contractors to Grant, whether known or unknown, had or could have had the slightest effect upon the success or failure of the undertaking. And this is further proved by the fact that the whole sum paid to Clark & Punchard was £213,000, which left unprovided by the company the whole aggregate of the sums agreed to be paid to the Duke de Saldanha, Larmanjat, and Grant.

This construction of the act is, as above noticed, supported by the omission of the words "or any or either of them" after the words "promoters, directors, or trustees," which seems to confine the application of the clause to the bodies of persons mentioned, and who would represent the company and contract on its behalf for whatever might be required to be provided before its formation. *So the words "whether subject to adoption by the directors, or the company, or otherwise," seem to imply that the contract is intended ultimately to become the contract of the company.

This view of the section involves the question, whether a contract strictly within its terms as being made by the promoters or the intended directors, and to be afterwards the contract of the company, is still to be disclosed in the prospectus, although it should be in no respect detrimental, but obviously advantageous to the company. Thus, if the promoters had agreed for the purchase of a piece of land for the erection of a station, and the purchase had been made at a sale by auction by the government, so that no fraudulent excess in the amount of the price to be paid could be suspected, must this contract of purchase have been disclosed?

It is unnecessary, however, to consider this question further, as it has no application to the present case; but, on the other hand, it may be fit and necessary within the act, that any such contract should be stated, because if made on behalf of the company, and it was ultimately to become the contract of the company, it might be that the price to be paid, or perhaps the purchase of the land itself might be such as to subject the company to a heavy liability, or to the payment of an exorbitant sum of money to some one unduly favored by the contractors. This question, however, may

well be determined, when it shall arise in some case in which the interests of the company are affected by it. I have only, therefore, to observe that I adopt the argument of Mr. The-siger, that the objects of the statute were to protect the shareholders of the company against some secret contract entered into, as in Overend & Gurney's case, and directly and largely affecting the interests of the company and the value of the undertaking to the company itself, and consequently to the shareholders. And I do not see that the construction which I put upon the act is substantially at variance with any opinion pronounced, and directly bearing upon the question in this case by any of the judges in *Gover's Case* (¹), or in other cases cited. I except, however, the opinion expressed by my Brother Brett (²), and also by the late Mr. Justice Honyman (²), which, although every way entitled to great *weight, appear to me to be at [512] variance with the language as well as the spirit of the act of Parliament.

If, however, this view of the statute be incorrect, I am still of opinion that there ought to be a new trial, by reason of the mode in which the questions supposed to arise were left to the jury. As far as I can collect from the report of the summing up, the learned judge at once declared that in his judgment the contracts were within the words of s. 38, and if that be so, there was no question for the jury upon this point at all, for the suppression of them in the prospectus would at once have constituted the fraud complained of by the plaintiff. But the jury were asked whether it was important to have these contracts disclosed to the public, and whether they were material to be communicated to the public or to the purchasers of shares. Now I must say that these questions appear to me to be far too vague and undeterminate in their effect to be left to a jury in a case like this. The statute contains no guide or indication upon which a jury can arrive at any intelligible, and reasonable principle of construction, and if any test is to be applied of the importance or the materiality of the disclosure of the contracts, it must be surely the question whether the effect of the contracts is substantially detrimental to the company, and such as to impose upon them some burden or liability directly affecting the value of the shares in the hands of the shareholders. Again, the plaintiff was asked whether, if he had known of these contracts, he would have become the pur-

(¹) 1 Ch. D., 182.

(²) In *Gover's Case*, 1 Ch. D., 182.

(³) In *Cornell v. Hay*, Law Rep., 8 C. P., 328.

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chaser of the shares. Surely this is no criterion upon which the decision of such a case can by law depend. The plaintiff might have sworn, and truly sworn, that he would not have become a shareholder if he had known that Mr. Grant had anything to do with the formation of the company, and yet his interposition in its formation might have been in every way advantageous to the company, and have enhanced the value of the shares. And whichever way all or either of these questions might have been answered by the jury, the company might have been benefited and not injured by the contracts in question, and the value of the shares increased and not diminished; and yet a jury might think it material or important that they should have been made known, and the plaintiff might have refused to purchase the shares, if the contracts had been disclosed.

513] *I pursue this part of the case no further, and proceed, I hope briefly, to consider the question of damages. Upon this point it is difficult to deal with the evidence at one view, and to determine whether or not there has been a miscarriage of justice in the verdict delivered. Let me consider, first, what the case for the plaintiff really was, and what evidence he was bound to lay before the jury in order to entitle himself to a verdict with damages.

Assuming that the suppression of the contracts in the prospectus was fraudulent as against the defendants, and that the plaintiff was induced by his ignorance of the existence of these contracts to become a purchaser of the shares, it was still incumbent upon him to prove that the shares were of less value to him than the sum of money which he paid for them, and as the verdict is for the entire sum, he was bound to prove that they were of no value at all. The circumstances of this case are, however, peculiar, because it is left in uncertainty at what time the plaintiff was first aware of the existence of these contracts, and it is the value of the shares at that time, or the difference between the value or price which he could then have obtained for them, and the price that he paid, that he is entitled to recover in this action.

Now it appears to me that it was for the plaintiff to prove, and to prove distinctly and expressly, the time when the existence of these contracts became known to him, because it was then, and I agree it was not before that he became entitled to maintain the action. I see no difference between this case and the case hypothetically put during the argument that the plaintiff had become the purchaser of a picture falsely represented to be a Vandyke, and that he after-

wards discovers that it is not an original but a copy. He is then entitled to maintain his action, and if the circumstances of the case be such as that he can restore the picture to the seller he is entitled to deliver back the picture, to rescind the contract, and to recover the entire price which he has paid. But if he think fit to retain the picture, he can recover only the difference between the price he has paid and the value of the picture when his right of action accrues. In this case it was, I think, incumbent upon the plaintiff to prove first that he purchased the shares at the price of £700. I agree that he was not bound to sell the shares at the time of the purchase, or at any *time afterwards, until the [514 suppression of these contracts became known to him; and therefore I do not agree with Mr. Thesiger that the right of the plaintiff is limited to the difference between the price paid for the shares, and the value of the shares either at the time of the purchase, or at any given time afterwards until he became acquainted with the suppression; but it was for him to show what and when that time was; and this he failed to show distinctly, but left it in uncertainty; for while he said in general terms that he knew of the contracts only at the time of or after the petition, his solicitor who presented the petition swore that he presented and conducted it from information received, as well before as after it was presented. And it was further proved that the shares were quoted on the Stock Exchange at from 15s. to 25s. a share, that is at the intermediate price of £1, as late as the month of March next after the month of November in which the petition was presented. Unfortunately the witness, who was the plaintiff's witness, came unprovided with the price of the shares in 1874, or particularly in the month of November in that year; but as they declined for nearly the last year before the month of March, 1875, when they were at £1 per share, they must have been at a higher price when the petition was presented in November. Under these circumstances I consider that the attention of the jury ought to have been distinctly called to all this evidence, and it should have been put to them pointedly to find the time when the plaintiff first knew of the contracts, and then to find the price, which could have been obtained in the market for the shares; because that price, whatever it might have been, should have been deducted from the £700, the entire price of the shares to the plaintiff, for which entire sum he has obtained the verdict. Whereas I find that the case was thus left: "On this matter of the damage I leave the question to you thus: The plaintiff is entitled, if you think

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there has been fraud, to what that fraud has cost him ; the real damage occasioned by the fraud. If you think the real damage occasioned by the fraud is the full amount of the shares, give him the full amount of the shares, £700. If you think there is evidence in this case to show, that the amount of fraud is not to the extent of £700, then give him as much less as you think in your judgment the fraud has really occasioned him loss."

515] *Thus the jury were left with this vague and general direction, instead of being told expressly that they were to compare the whole sum paid for the shares with what the shares would have produced, if sold when the plaintiff first knew of the suppression. In any case I think this charge would have been unsatisfactory ; but when we remember the cause was tried as undefended, that the defendants had no counsel to cross-examine the witnesses, or request the attention of the judge to the particular evidence above adverted to, it seems to me impossible to hold that this verdict was satisfactory. And this brings me to the cause of the case being undefended. The rule for a new trial does not specify the refusal of the judge to allow the defendants to submit to a verdict for the damages claimed, and the costs, and to suffer judgment for all that the plaintiff demanded, or could or desired to recover, as one of the grounds of the motion for a new trial. But still the case was tried against the will and notwithstanding the protest of the defendants ; and the plaintiff's case during nine days was conducted by some of the ablest counsel at the bar, and unopposed, and all this at the cost of the defendants, and with the prejudice necessarily created in the minds of the jury by the defendants having withdrawn from the defence of the case ; and the plaintiff's case being urged upon them with all the power and eloquence of his counsel as a case of atrocious and unparalled fraud. Thus too the evidence that the petition, which in effect put an end to the existence of the company, and rendered the shares unsalable in the market, and at last reduced their value to nothing, was the act of the plaintiff himself, was altogether disregarded and unnoticed ; and upon these grounds I think, that as respects Mr. Grant, there ought to be a new trial.

It also appears to me that there was no evidence to go to the jury of the issuing or publishing the prospectus by the defendants Clark & Punchard. They had sworn, I believe, in answer to interrogatories : "The prospectus was not issued by or by the direction or authority of us or either of us." "We believe we or one of us had seen it, and Mr.

Punchard, as contractor, was one of those present at a board meeting at which it was discussed. But save as aforesaid it was not issued with the sanction of us, or either of us, nor was our sanction required." All that I can find *directly to the point is that Mr. Keith being asked [516 by Sir H. James, "To this meeting was a proof of the prospectus brought?" Answer: "It was." Question: "By whom?" Answer: "I believe by the secretary. There was only one copy, and I am not aware how it came to the office." Question: "Was it brought by Mr. Morgan?" Answer: "Either by Mr. Morgan or Mr. Punchard." Surely this is no evidence against the one or the other. If it was brought by Mr. Morgan, who had certainly acted as the solicitor of Clark & Punchard, yet he was also the solicitor of others of the company, and although the solicitor of Clark & Punchard, still there was no evidence that they or either of them had authorized him to deliver the prospectus.

The remaining evidence is simply that it appears in a letter that Grant transmitted a number of those prospectuses to Clark & Punchard, and requested them to distribute them; but there was no evidence that they did in fact distribute a single prospectus. On this ground I think if it stood alone, that there ought to be a new trial.

I am therefore of opinion that the verdict should be entered for the defendants upon the ground that the contracts are not within the act, or that there should be a new trial, and without payment of costs.

COCKBURN, C.J.: This was an action brought by the plaintiff, upon s. 38 of the Joint Stock Companies Act of 1867 (30 & 31 Vict. c. 131), to recover the amount paid by him on seventy shares, of £10 each, in a joint stock company, called the "Lisbon Steam Tramways Company," on the ground of the fraud of the defendants, within the meaning of that enactment, in omitting from the prospectus of the company, issued, as was alleged, by them as promoters, two contracts entered into by them, also, as was alleged, as promoters—the one a contract between the defendants Clark & Punchard, and the Duke de Saldanha, the proprietor of certain concessions which the company was formed to work; the other a contract between Clark & Punchard and the defendant Grant, as to certain payments to be made by Clark & Punchard to Grant, in consideration of his obtaining for them a contract from the company for the construction of the tramways—*by means of which fraud [517

the plaintiff had been induced to apply for and take the shares in question, which had proved worthless.

The cause came on for trial before the Lord Chief Justice of the Common Pleas Division and a special jury, at Guildhall, when evidence was given to the following effect:—

In 1871, the Duke de Saldanha, then being the representative of Portugal in this country, had obtained concessions from the Portuguese government for making steam tramways, according to the patent of a Monsieur Larmanjat, on the public roads between Lisbon and Cintra, with an extension from Cintra to Pero Pinheiro, and between Lisbon and Torres Vedras, and thence on to Leiria—the whole (with the necessary sidings) being a distance of about 120 miles—and had completed a distance of about four miles between Lisbon and Lumiar, on the way to Torres Vedras. Being without the necessary capital to give further effect to the concessions, it occurred to him to form an English joint stock company, to which the concessions should be made over, on their paying him a certain sum in cash, and a further consideration in shares.

With this view he entered into communication with the defendant, Mr. Grant, and the terms on which the concession should be assigned were arranged between them. But Grant, not being willing, as it seems, to appear as taking part in the transaction, instead of himself purchasing the concessions, and disposing of them to a company, entered into communication with the defendants, Clark & Punchard, who are railway contractors, and proposed to them to purchase the concessions, and make them over to a company which he undertook to form; stipulating, however, that, if he should succeed in obtaining a contract for the construction of the work, which should be satisfactory to Clark & Punchard, they should pay him £40,000 in cash, and £5,800 in fully paid-up shares, or cash at their option. The contractors were further to find a sum of £8,000 for the purpose of qualifying the directors, which Grant was in the first instance to pay, which, with the £45,800, would make, in round numbers, a sum of £52,000. This amount was to be covertly included in the price to be obtained by Clark & Punchard from the company.

Besides this, Clark & Punchard undertook to take, if required by Grant so to do within thirty days after the 518] allotment of shares, *4,200 shares from Grant at par—the purpose of this apparently mysterious stipulation being beyond doubt to enable the defendant Grant to buy shares in the stock market at a premium, with the view of

giving to the shares a fictitious value when the undertaking should be presented to the public, with no greater possible loss to himself than the difference between the amount of such premium and the par price of the shares, while if the shares should rise to a premium, the profit would be his.

These terms having been agreed on between Grant and Clark & Punchard, it was arranged with the Duke de Saldanha that Clark & Punchard should purchase the concessions, to be by them made over to the company to be formed. This done, the defendants set to work to form the company.

In the meantime Clark & Punchard—treating Grant as representing the future company—sent in to him a tender on the 2d of June, which, however, had reference to the cost of the works and rolling stock alone, and did not include the payments to be made by them to Grant. In this tender they estimate the cost of laying down the tramways upon 120 miles including sidings—the distance at that time contemplated—at £171,000, being at the rate of £1,425 per mile; that of finding rolling stock at £74,968; and that of doing the necessary work on the stations at £26,000—making in all £271,968.

On the 12th of June, Clark & Punchard sent in another tender, not addressed to Mr. Grant, but, by anticipation, to the directors of the company—at this time no directors had been appointed, nor was the company as yet in existence—in which the proposed price was raised to £307,600. In the contract actually executed between them and the company the sum was slightly raised, and fixed at £309,810.

By the beginning of July the company was provisionally formed. Articles of association were executed on the 6th of July, and registered on the same day, the company then consisting of seven persons, each taking one share; and a board of six directors having been provided by the defendants, besides the Duke de Saldanha, who was to be the chairman, the board was appointed accordingly by the seven shareholders on the same day, after which the directors proceeded to appoint the officers of the company.

*It now becomes necessary to advert to the con- [519] tracts in respect of which the charge of fraud is preferred. On the 5th of July, the day previous to the registration of the company, a contract had been executed between the Duke de Saldanha and Clark & Punchard, whereby the duke assigned to them his interest in the concessions, together with his right to use Larmanjat's invention, for

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£22,000—£6,000 in cash, to be paid within three calendar months after the first allotment of shares and payment made thereon, and £16,000 in paid-up shares in the company. If, however, a sufficient amount of capital should not be subscribed to warrant the issuing of shares, or if Clark & Punchard should fail to obtain the contract for constructing and equipping the lines, the agreement was to be void. At the same time a subsidiary contract was made with Larmanjat by Clark & Punchard, whereby Larmanjat was to accept from them a fixed sum of £7,000, instead of the royalties he was to have received under his contract with the duke.

On the ensuing day, the 6th, a contract was executed between Grant and Clark & Punchard, embodying the terms previously agreed upon between them, and which have already been stated.

A contract, of the same date, between Clark & Punchard and the company, was adopted by the directors at a meeting held on the next day, the 7th, and was duly executed. By this instrument Clark & Punchard assign the concessions to the company, and undertake the construction of the tramways, according to the plans and specifications, for the sum of £309,810, to be paid as follows: £75,000 after the first payment on the shares, and, thenceforward, £14,000 on the 1st of every month, subject, however, to the condition that after £190,000 should have been paid in cash, the rest, if the company so required, should be taken in debentures of the company bearing interest at 8 per cent. But here a remarkable circumstance presents itself. In the plans and specifications attached to this contract the line from Torres Vedras to Leiria was omitted, that part of the projected line being abandoned altogether; and the mileage was thereby reduced from 120 to 68 miles, while the number of stations was reduced from eight to five. Yet the price to be paid to the contractors was slightly increased instead of being ⁵²⁰ bly diminished. No explanation *of this singular fact has been offered. It does not seem to me unreasonable to infer that the reduction was found necessary in order to enable the contractors to meet the heavy amount which they were called upon to pay in cash or shares to the Duke de Saldanha and Mr. Grant. These, as we have seen, amounted in the whole to £74,000—£22,000 to the duke, and £52,000 (in round numbers) to Mr. Grant. A reduction of 52 miles—the difference between the lines contemplated in the tenders and the 68 miles to be laid down under the contract—at the rate of £1,425 a mile—the estimated

cost of Clark & Punchard for the execution of the work—comes exactly to £74,000, the identical amount so to be paid. The coincidence, to say the least of it, is a very striking one.

By the terms of this contract, it should be further observed, the entire line was to be completed by the 31st of December, 1872, the contractors agreeing to pay 7 per cent. interest on the paid-up capital of the company in the meantime.

The adoption of this contract appears to have been taken as a matter of course. It was brought before the directors, not in draft, or for consideration, but ready prepared for execution. No inquiry had been made on behalf of the company as to the charge proposed for the execution of the work. No engineer had up to that time been consulted. The terms had been arranged between the contractors and Mr. Grant, and this appears to have been considered sufficient. No estimate appears to have been submitted to the directors; the previous tender of the contractors does not appear to have been brought before them; nor do they appear to have been aware of the reduction of the mileage.

At this second meeting of the directors, held, as I have just said, on the 7th of July, the contract with Clark & Punchard having been adopted, the proposed prospectus was taken into consideration. It had been prepared by the defendant Grant, in communication with Clark & Punchard; and the original draft, partly printed and partly altered in manuscript, which was produced on the trial, bears marks of extreme haste. It contains very numerous alterations, interlineations, and passages expunged, in the handwriting of Mr. Maurice Grant, the defendant's manager. In this state, there not being time to make a fair copy, it was *brought to the board, either by the [521] defendant Punchard or his solicitor, Mr. Morgan, who the day before had been appointed solicitor to the company—both appear to have attended on that day—and was adopted by the directors, and ordered to be advertised and published.

That Grant and Clark & Punchard were acting in concert in the preparation of the prospectus is manifested by a particular circumstance. In the draft prospectus, as originally printed, there appeared a passage stating that there was "every probability of dividends ranging between 15 and 25 per cent. per annum." This passage had been struck out by Mr. Grant on revising the draft. But the draft

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as revised having been sent to Clark & Punchard for approval, Punchard wrote against the expunged passage the words, "Stet. C. P. & Co." In a letter from Mr. Grant to Punchard of the 8th of July, he writes, "On second thoughts, after I sent up to you yesterday, I did not think it prudent to vary the prospectus as to estimate of traffic, and consequently did not use the power you gave me to do so."

In the prospectus as adopted the lines of tramway to be laid down are specified, and shown to extend to about 68 miles—from Lisbon to Torres Vedras 35 miles; from Lisbon to Cascaes 17 miles; from Cascaes to Cintra 9 miles; and from Cintra to Pero Pinheiro 7 miles. The contract with Clark, Punchard & Co. is referred to as having been made for "the construction of the lines, erection of stations, and a complete equipment of rolling stock, for the sum of £309,810, payable as to £190,000 in cash, and the balance in cash or debentures at the option of the company." After which follow these words: "This sum includes the acquisition of the concessions, and the license of the patent rights;" to which, in the original draft, was added, in the handwriting of Mr. Grant, "and also all payments incidental to the formation of the company." But, except so far as they may have been meant to be included in the last-mentioned words, there is no reference in this document to the pecuniary arrangements entered into between Clark & Punchard and the duke, or between Clark & Punchard and Grant, still less any such reference to the contracts between these parties as is required by s. 38 of the Companies Act of 1867, supposing these contracts to be within that section.

522] *There is no ground for believing that the directors were at this time aware of the secret contract between Clark & Punchard and Grant. They must, of course, have been aware that there had been a contract between Clark & Punchard and the duke, whereby Clark & Punchard had acquired the concessions; but, with the exception of the duke himself, it is quite possible that all may have been unacquainted with the terms of the bargain. There is every reason to think that all parties believed that the undertaking was a genuine one, and likely to be successful. It is probable that the Duke de Saldanha took the sanguine view of the undertaking which a man deeply interested in a given result is apt to take, and inspired his colleagues with equal, and equally mistaken, confidence. The prospectus was issued with great precipitation, and the project offered to the

public, and the shares allotted, before the line had been duly surveyed, or even inspected, on behalf either of the company or the contractors. In the result, after the company had been completely formed and the shares paid for, the line from Lisbon to Cintra, as originally proposed in the prospectus, had to be abandoned for another route, and the branch from Cintra to Pero Pinheiro was given up altogether. The only misgiving which, according to Mr. Keith, the secretary, appears to have occurred to the directors, was as to the sufficiency of the capital of the company. That that misgiving would have been strengthened had they been made aware of the arrangement by which upwards of £50,000, supposed to be part of the amount to be paid to the contractors for constructing the line, was to go to Mr. Grant, may readily be assumed. But for the blind faith which the directors appear to have placed in those with whom they were dealing and the haste with which the business was conducted, the directors might have been struck with the reduction of the mileage to the extent of one-half from that of the tender, with no corresponding reduction of costs—that is, if they had inquired, as they should have done, if any tender had been made—and might have instituted inquiries which would have brought this part of the transaction to light.

The issuing of the prospectuses having been ordered by the directors, the draft was delivered to Mr. Grant, for the purpose of having it printed and published in the usual manner, this part of *the business being left entirely to [523 him; and this he accordingly did. In the meantime he had carried on certain operations on the Stock Exchange, the effect of which was to give a fictitious value to the shares about to be issued. Applications for shares came in abundantly; upwards of 35,000 were applied for. The applications were referred to Mr. Grant, who decided to whom shares should be allotted. The allotment commenced on the 1st of August. The whole number was speedily taken up, and the company was formed. The borrowing power was exercised, and £50,000 was raised on debentures of the company.

In the meantime, Mr. Trevithick, who had been appointed engineer to the company, had gone out to Portugal to survey the lines, and the report made by him, bearing date the 21st of August, at once showed the impracticability of the scheme, as proposed in the prospectus. He had found the line from Lisbon to Cascaes, and thence to Cintra, impracticable, except at a greatly increased expense, owing

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to the exceptional steepness of the gradients, which would render considerable detours necessary, and to the narrowness of the road in places, which would have to be widened. He also found that under the existing concession, the line could only be commenced from Belem, a suburb distant a mile and a half from the entrance to Lisbon itself.

On the receipt of this report, Mr. Grant, foreseeing, no doubt, the disturbance which would ensue if the project should be persevered in under the certainty of failure, proposed to Clark & Punchard at once to give up the undertaking, and to return their money to the shareholders, which might then have been effected at the loss of a few thousand pounds. Concurring in this view, Clark & Punchard, at the suggestion of Grant, who was absent from town, urged this course on the directors, who it appears would have assented to it, but for the remonstrance of the company's brokers, who represented that as there had been dealings in the shares on the Stock Exchange, it was absolutely necessary that the company should go on and a settling day be appointed. The directors, perhaps not altogether uninfluenced by an unwillingness to give up the concern, unfortunately yielded to this representation, and the company was kept alive, only to come to a more distressing end at a later period.

524] *And now a most material change, so far as Cintra was concerned, was introduced into the scheme, probably at the suggestion of the engineer. The line from Lisbon to Cascaes, along the right bank of the Tagus, and from Cascaes to Cintra, was abandoned, and a new line direct from Lisbon, across the country to Cintra, substituted for it, whereby the distance was reduced from 25 or 26 miles to 16; besides which, the branch from Cintra to Pero Pinheiro was wholly given up, still further lessening the mileage by 7 miles; thus reducing the 68 miles of the prospectus to 51 or 52. Yet, though by this change the difficulties of the original line were avoided, and the distance materially diminished, it was found necessary, in order to obtain means to construct the line as thus altered, to find further capital to the extent of £40,000. This, as the whole of the share capital of the company had been raised, and it was probably deemed unwise to have further recourse to the borrowing power, was effected by an agreement of the 20th of September, whereby the duke relinquished in favor of the contractors £11,000 of the amount he was to have received; Larmanjat, £3,000; Grant, £17,500; but the last with an increase of the amount to be paid to him in shares

to £11,000; while the contractors themselves made up the rest. No notification of this important modification of the original scheme was made to the shareholders till the 25th of June, 1872, when the directors in transmitting to them the warrants for interest due on the 1st of July, informed them that the directors had been enabled "immediately after the formation of the company, through the assistance of the Duke of Saldanha, in obtaining a further concession, to adopt a direct road to Cintra, in lieu of the more circuitous and inconvenient road first proposed, and thus to prevent all possibility of competition by the shorter route." No steps were taken to obtain the assent of the shareholders to this important change.

The lines from Lisbon to Torres Vedras, and from Lisbon to Cintra, as thus finally settled, were not begun for some months, and were not completed till July, 1873, instead of by the 31st of December, 1872, as stipulated for by the contract. Notwithstanding this delay the periodical payments were regularly made to the contractors, as though the work had been carried on and executed *as required by [525 the contract. The entire cost appears to have amounted to £254,050. The lines having been completed and worked for a period of sixteen months, it was found that, the traffic proving less than had been expected, instead of a profit being realized, a loss of £8,000 had taken place on the working of the lines during that time. The gross takings during these sixteen months had been £10,439, the expenditure £16,462. In the meantime no payments had been made on the debentures; and the interest due to the share and debenture holders, already amounting to £12,000, was, of course, accumulating. On the other hand, there appeared to be nothing to lead to any reasonable expectation either of the traffic increasing or of the expenses of working the lines being capable of being diminished. Under these circumstances, on the 1st of December, 1874, the plaintiff presented a petition for winding-up the company, and an order was made thereupon, after full inquiry and discussion, on the 16th of July following. We must take it, therefore, that the judge was satisfied that all hope of working the lines with success was at an end. No evidence is before us to show that the lines were not properly constructed or efficiently worked. The failure of the undertaking appears to have arisen solely from the insufficiency of the traffic to afford a remunerative return on the outlay expended. In the course of the proceedings on the petition the plaintiff became aware of the contracts between Clark & Punchard

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chairman of the intended company had entered into an agreement with the contractors whereby they were to pay him a sum of money for the concessions if the company should be formed and the contractors should obtain a contract, and still more, that the principal promoter was to receive a sum of £52,000, upwards of one-seventh of the the entire capital of the company—of which £6,000 was to go to the directors, and £10,000 was to be expended in giving a fictitious value to the shares—that while the capital [528] of the company was *stated to be £200,000 with a power of borrowing to the extent £150,000 more, in reality it would be less by £72,000; and that while the sums to be expended on the work and on the acquisition of the concessions and the preliminary expenses was stated to be £310,000, the items referred to were to swallow up a sixth of that amount—or that such circumstances, if known, would have been calculated to create a well-founded distrust—cannot, I think, admit of a moment's doubt. Such a state of things could not but inspire distrust. The prospect of gain is apt to make men careless of the interests of others. In the present instance a prudent man, if he had been made aware of these contracts, might well have anticipated what in fact came to pass, namely, haste and precipitancy in launching this project, in which the parties to these contracts were so much interested, without due inquiry or consideration of the interests of the future shareholders, to say nothing of an unwise perseverance in it when it ought to have been seen to be a failure, and should have been abandoned. These were clandestine contracts which involved spoliation of the future company. It is in vain that Mr. Grant tells us that he was justified in demanding 10 per cent. on the capital of the company in reward for his services in forming it. He was to receive more than twice that amount, a sum extravagantly in excess of any services rendered by him. But whether a promoter may claim for his services in forming a company a reward to be paid from its funds, or whether the sum to be paid may be fair or excessive in the particular instance, is not the question. The question is whether, to prevent extortion and abuse, such contracts must not be disclosed. While, on the one hand, the amount of such secret payment may be reasonable, on the other, it may obviously be so large as to cripple the resources, and frustrate the success of the future company.

Among the first things as to which a careful man, disposed to invest in an undertaking, would inquire, would be the adequacy of the capital to the intended purpose, ade-

quacy of capital being essential to the success of an enterprise. He satisfies himself on the point; but he is kept in ignorance of a secret agreement, whereby a large proportion of the capital, or of the amount to be paid to a contractor, is to be withdrawn from its ostensible *purpose, and [529 expended in corruption. Had he been made aware of this, he might not have consented to join the company.

The next point which a man would desire to ascertain would be the constitution and probable management of the company. What would he say if he were told that the owner of the concessions which the intended company was to purchase was to be the chairman of the board, and was only to be paid by his buyer if he (the buyer) got a contract from the board, which contract was to be procured for him by the promoter, who, again, was to receive a large sum of money for getting it, which, however, he was sure to do from the chairman and the other directors, the first being interested in giving it in order to get his price for the concessions, the last knowing nothing about the business except what these interested parties thought proper to tell them.

It thus being manifestly to the interest of the shareholders that such arrangements should not be kept secret, why is it to be said that they are not within the section? That the terms of the section are large enough to embrace such contracts cannot be denied. Its terms could not be more general or comprehensive. Indeed, it is from this very comprehensiveness that, strange to say, the main argument for the limitation sought to be put on the section, so as to exclude these contracts, is derived. It is said you cannot take this enactment in its literal effect; for, if you did, it would include all the contracts of a man who happened to be a promoter or director, though relating to his own private affairs. True; and as the Legislature is here dealing with public companies only, we may with perfect safety assume that the section is intended to apply to contracts relating to such companies alone. But when we have to deal with a contract undoubtedly having reference to a company, why are we to put any further restriction on the operation of the statute? It is said that the Legislature in passing this section had in view a particular mischief only, such as had come to light in the case of Overend & Gurney—where in the articles of association the estate of the firm intended to be transferred to the company had been represented as solvent, while by a secret deed a sum amounting to upwards of three millions or more, and in the public statement in-

cluded in the assets, was dealt with by the directors as **530]** fact lost, so that the estate was *hopelessly insolvent—and that the enactment must therefore be limited to contracts by which either a benefit is secured to, or an obligation or burden is imposed upon, the nascent company. But this limitation appears to me to be much too arbitrary and narrow, and unwarranted either by the language of the act, or by what we know of this legislation. If it had been the intention of the Legislature thus to confine the effect of the enactment, nothing would have been easier than to say so in distinct terms. Why then is it to be limited to contracts entered into on behalf of, or binding on, the company? Not only is the language of the section unrestricted, but it expressly refers to contracts which do not require to be adopted by the company, as well as to those which do. Now I know of no contract which can impose an obligation or a burden on a company which would not require to be adopted by it.

But I desire to place the argument on broader grounds. I do not feel myself at liberty to speculate on what may have been the intention of the Legislature when I find a positive enactment, framed in general terms, and a positive evil which is within its terms, and, as I cannot but think, altogether within its spirit, and to which it may be applied beneficially. If such a case as the present be not within the enactment, all I can say is that it ought to be. And I cannot allow myself to be led into splitting hairs, or to entering into minute verbal criticism on what I believe to be beneficial legislation. When, therefore, I find the case indisputably within the terms of the act, when taken in their ordinary sense, why am I to give a different and narrower meaning to those terms in order to exclude it? It is admitted that a contract which imposed a burden on the company would come within the section. But, in the name of common sense, what difference is there in principle between a contract which takes money from the company's funds by an obligation directly binding the company, and one which saps those funds through a clandestine contract with a contractor? The one form of proceeding is no doubt more subtle and insidious than the other, but it is not the less prejudicial to the interest of the company, or less essential to be made known to those who are invited to join it.

I take it to be a sound canon of construction in the application of **531]** a statutory enactment, that full effect should be given to general terms, unless from the context, or other provisions of the statute, a limitation on the general

language must necessarily be implied, more especially where, had such a limitation been intended, it might reasonably have been expected to be expressed. Here nothing would have been more easy than for the Legislature to say that the contracts of the promoter, to which the section applies, should be such only as affected the company prejudicially or otherwise. But nothing of the kind appears, and I do not feel myself at liberty to introduce by implication the restriction contended for, more particularly as I am at a loss, as I have already pointed out, to see to what class of contracts, as thus directly affecting the company, the enactment can have been intended to apply. It is notorious that among the various forms of spoliation to which shareholders have been exposed, private bargains made by promoters for their own gain, at the expense of the company about to be formed, have not been the least frequent. I see no reason to think that the statute was not intended to strike at such surreptitious transactions, and I do not feel myself at liberty to abridge what I think will be its salutary effect if applied to them.

I purposely abstain from entering on the question whether in this particular instance the contracts in question had any effect in bringing about the eventual failure of the company. The fraudulent character which the statute attaches to the omission to refer to such contracts in the prospectus does not in any degree depend on the result. If a contract is within the section, the omission to refer to it is made fraudulent whatever the result. The fact whether the result was brought about by it is, therefore, altogether beside the question.

It was urged on us that, if the full effect contended for was given to the 38th section, every petty contract entered into in the preliminary formation of a company, such as contracts for advertising and printing, or for stationery or offices, would have to be referred to, at the risk of otherwise incurring the penalty of the statute. But the answer to this is to be found in the provision which gives the statutory remedy only when the shareholder has taken his shares on the faith of the prospectus as published.

When it is urged that there is no impropriety in the promoter *of a company receiving remuneration for his [532 trouble in forming it, and that the necessity of referring to such a contract as this would apply to cases in which no more than a legitimate remuneration had been secured, the answer is, that while the reference to such a contract in the prospectus would occasion little inconvenience, on the other

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hand, as such a bargain might be a most extortionate one, amounting possibly to a large proportion of the company's funds, it is essential that its disclosure should be held to be necessary. If a company, whose works can be executed for £250,000, are asked to pay £300,000 to a contractor, in order that the contractor may be able to afford a bonus of £50,000 to the promoter, it is but right that the shareholders should be made aware of what they are about to assent to.

Again, when it is said, as a reason for putting the restricted construction contended for on the comprehensive language of the act, that the shareholder, if any fraud is practised upon him, has already his action at law, the obvious answer is that the statute was intended to give him protection beyond what his legal remedies afforded him. There are cases in which, in the absence of active fraud, passive misrepresentation, that is to say, silence as to some fact which it would be material to the one party to know, but which the other is not legally bound to communicate, may involve the one in loss, but in which the party suffering what amounts to a moral, but not a legal, wrong, has no remedy at law. In the ordinary transactions of life, an individual can make inquiries and require positive information, or insist on a warranty, before entering into a contract or embarking in a common enterprise. But in these vast undertakings, carried on by the united enterprise and capital of hundreds, perhaps thousands, of shareholders, the individual shareholder is more or less at the mercy of those who invite him to join the company, as to the facts on which he may be led to invest his money. Experience has shown that shareholders may be plundered, not only by being led to invest in bubble companies, but also where the undertaking is intended to be carried out (as was, I have no doubt, the case in the present instance) by the resources of the company being impoverished by clandestine agreements, from which failure 533] of the enterprise results, or by the company *being made to pay largely in excess of the value of what it gets by the cupidity of those who set it going, and that shareholders may be victimized by being made to pay more than the real value of their shares, owing to dishonest or improvident bargains made in the inception of the undertaking, and not disclosed in the prospectus. It was, I must assume, to protect the shareholder against these things, and to insure him all the information necessary to judge of the merits of the undertaking, that the enactment in question was passed, which requires, as I read it, that he shall be informed of all contracts entered into in the inception and formation of the

company prior to the invitation to the public to join it by taking shares. It was for this reason, I presume, that contracts entered into by promoters, who are the parties by whom companies are usually formed and set going, are expressly included. If contracts binding or affecting the company had alone been intended to be within the operation of the statute, as these contracts, to be binding, would have required to be adopted by the directors, or the company, they would have become the contracts of the company, and would not have needed to be referred to as contracts of the promoters. To hold that the statute left the shareholder in no better position than that of a party to an ordinary contract at law would be simply to render the enactment nugatory.

The case in which a man, who has acquired a right, makes it over to a company, though perhaps at an exorbitant price, falls very far short of this. Here by an insidious contrivance, the exorbitant price is concealed in the sum to be paid to the contractor, whose clandestine arrangement with the recipient is unsuspected, and who is supposed to be asking no more than a fair remuneration for the work to be done.

Taken at its best the statute affords but a poor protection to the shareholder, and falls very far short of what it should have effected, inasmuch as it requires only the names of the parties and the dates to be stated, without any reference to the substance of the contracts. Nevertheless, the mention of such names and dates may afford some assistance to the invited shareholder, and help him towards judging of the soundness of the proposed undertaking. Thus the fact of contracts having been entered into between the chairman and the contractors, and between the latter and a [534 well-known financier, on the very eve of the company being formed and the prospectus issued, if disclosed, might have made a prudent man hesitate to join the company until further information as to the nature of these contracts had been obtained. The insufficiency of the legislation affords no ground for abridging its operation. All we have to look to is whether a contract, if set out in full, would have been within the section. If it would, we must hold that the omission of the particulars which the enactment requires amounts to a fraud on the shareholder who has acted on the faith of the prospectus.

Thus far I have dealt with the question on principle, irrespectively of authority. Nor is there very much authority

on the subject. In *Cornell v. Hay* (¹), which was an action brought by a bondholder in the Canadian Oil Works Corporation against a director, under the 38th section, for not having disclosed in the prospectus certain contracts entered into by the promoters with the defendant and the other directors, whereby the promoters engaged to give them certain sums in cash, or paid-up shares, in consideration of their becoming directors, Mr. Justice Honyman observing on the argument of Mr. Williams, that the contracts referred to in the 38th section were limited to contracts "made by promoters, as representing, or on behalf of, the company," "contracts of which the burden would fall on the company, and which, in substance, though not in form, amount to contracts of the company," says: "In the view I take, it is unnecessary to decide whether we shall adopt the construction of the section for which Mr. Williams so ably contended, namely, that the contracts intended by the section are only contracts made, or intended to be made, on behalf of the company; but I wish for my own part to say that I am not, as at present advised, prepared to adopt that construction. I cannot think it is a matter of indifference to the shareholders what contracts were entered into by promoters in their private capacity relating to the formation of the company. It is obvious that it may be of vital importance to them to know of such contracts in forming a correct judgment as to the position of the company. It might obviously make a very great difference if the names of persons who appeared on the prospectus as interested in 535] or connected *with the company were mere dummies, and such persons really had no stake in the concern at all." Mr. Justice Keating says: "I do not wish to be understood as giving any countenance to the argument that the contract disclosed in this declaration is not a contract such as the directors would be bound to disclose in the prospectus under the section. It seems to me that its subject-matter was such that a shareholder might reasonably be entitled to be made acquainted with it, and its non-disclosure appears to me to be within the mischief contemplated by the act." But these observations can only be received as *obiter dicta*, for the case was decided on another ground, namely, that the plaintiff, not being a shareholder, but a bondholder, was not within the protection of the statute—another instance, I may observe in passing, of the carelessness with which this section was drawn.

But in another case arising out of the same company, the

(¹) Law Rep., 8 C. P., 828.

case of *Charlton v. Hay* (*), the question now raised came before the Court of Queen's Bench for decision, the action being founded on the non-disclosure of the same contracts as were relied on in *Cornell v. Hay* (*), as also of a contract between Prince, the vendor to the company, and the promoters, whereby Prince was to receive only part of the purchase-money, leaving the remainder to be divided among the promoters. Mr. Justice Blackburn, with whom Mellor and Lush, JJ., concurred, held all the contracts to be within the 38th section. With reference to the contracts with Prince, he says: "We have to say whether this is a contract required to be disclosed by the terms of the section; and it seems to me that not only is it clearly included in these terms, but further, if it were not, the Legislature has failed to express what was certainly its intention and object. This one of the alleged contracts is at all events of immense importance to all the shareholders of the company, and even if not subject to adoption by the directors or the company, it otherwise comes within the description given of the contracts required to be specified." This decision is directly in point to the case before us. For what difference can there be in principle between money taken from the funds of a company by a secret bargain between the vendor and the promoters, and money so taken by secret bargains between the vendor, the promoter, and the contractor?

*But we are referred to *Gover's Case* (*) as in conflict with the foregoing; and as the decision in *Gover's Case* (*) was that of a court of appeal, if the decision really governed the case before us, we should be bound by it. But it does nothing of the sort. The question how far the omission of the contract there relied on by the plaintiff was within the 38th section was unnecessary to the decision of the cause, which proceeded, as held by all the court, on the ground that, the suit being instituted by the plaintiff, Miss Gover, to have her name removed from the list of shareholders on the ground of the omission of a particular contract from the prospectus, the suit could not be maintained, as the section gave no right to a person who complained only of fraud within the 38th section, to have his or her name removed from the list of shareholders, the only remedy given by it being a right of action against the individual wrongdoer. It is true there fell from the Lord Justice James expressions with reference to the contract which might lead to the conclusion that he deemed such a contract as not within the statute. But his reasoning is entirely

(*) 31 L. T. (N.S.), 437.

(*) Law Rep., 8 C. P., 323.

(*) 1 Ch. D., 182.

founded on the assumption that at the time the contract relied on was entered into, there had been neither company nor promoter. The contract in question was one by which one Mappin had bargained with a man named Skoines, the owner of a patent for an invention relating to gas-lighting, that, in consideration of £1,000 paid down, Skoines should convey the patent right, if he (Mappin) could form a company to buy and work the patent, on receiving a further sum of £4,000 in cash and £80,000 in paid-up shares of such company. If Mappin failed to form the company within a certain time, the bargain was to be void, Skoines retaining the £1,000. At a later date an agreement was entered into by Mappin with one Wright, as trustee for an intended company, by which Mappin agreed to sell the patent to Wright for about twice the amount he had agreed to pay to Skoines. Referring to the agreement between Skoines and Mappin, Lord Justice James says: "At the time when this agreement was made there was no company in existence, and *no promoter*, trustee, or director; the company had not even an inchoate existence, except in the brain of Mappin; and the utmost that can be said of Mappin was that he was 537] a projector of a company which he intended and *had agreed to promote." Further on the Lord Justice says, "It is said, that when the bargain with Skoines is looked at, it contains stipulations about the forming of the company, and the shares of the company. I cannot myself see that the court has, for this purpose, any right to read those stipulations. They were stipulations between Mappin and Skoines alone, and obligations as between them. Even if they were stipulations by Mappin to do something wrong in the company, or to the company, this might be evidence of that wrong, and proper redress might be given for that wrong, as a substantive ground for complaint. But that is, in my judgment, wholly beyond this section; and no impropriety in the contract can make it the contract of the company, or the contract of a promoter, trustee, or director of a company, when at the date of the contract there was no company, no promoter, no trustee, no director. The character of the contract cannot operate as a transformation of the contracting parties."

The Lord Justice deals with the case as though Mappin, having bought from Skoines, had simply sold to the company, and stood to them in the relation of an ordinary vendor to an ordinary purchaser, and was consequently not bound to disclose the contract whereby he himself had acquired the property.

In this judgment Lord Justice Bramwell concurred, adding only that to be within the 38th section a contract entered into by a promoter must be read to mean by a promoter *as such*.

Lord Justice Mellish appears to have taken a different view. He says: "I do not at present agree with the whole of the reasoning of the Lord Justice on this part of the case. If, indeed, the 38th section could be confined to contracts made by promoters and directors in their character of promoters and directors, or after they had become promoters or directors, the contract between Skoines and Mappin would not be within the section, because I agree that there was no fiduciary relation at the time when the contract between Skoines and Mappin was made. I think, however, that there are grounds for holding that this would be too narrow a construction, and that the section ought to be held to extend to every contract made with a person who afterwards becomes a promoter or director, provided the company have become entitled to the benefit of the contract, or have become *liable to perform the provisions of the [538 contract before the prospectus was issued."

Lord Justice Brett took a still wider view. He held that the enactment was remedial, and must therefore receive as large an interpretation as its phraseology would reasonably admit of, and, consequently, that it was intended to insure the disclosure of everything which might reasonably have an effect on the mind of an interested subscriber for shares as to whether he should trust the representation made to him, and become a shareholder.

It would be sufficient for the purpose of the present case to point out that, independently of this difference of opinion on the effect of the 38th section, *Gover's Case* (1) differs essentially from the one before us, inasmuch as there can be no doubt that here the contracts were entered into by the defendants when undoubtedly promoters of the company, with a view to, and incidentally to its formation. Mr. Grant cannot in any sense be said to have been a purchaser from the duke, or a vendor to the company. He carefully avoided assuming that relation. His position was, though not ostensibly, yet actually, that of a promoter. Fully admitting that a person who sells to a company is no more bound to disclose how, or upon what terms, he acquired the subject-matter of the sale, than an ordinary vendor to an ordinary purchaser, it seems to me that when the vendor adopts the character of a promoter, the matter assumes a

(1) 1 Ch. D., 182.

very different aspect. A fiduciary or, at all events, a quasi-fiduciary relation arises between him and the company. He is bound to protect its interests, and those of the shareholders. All his dealings with them, and for them, should be *uberrimæ fidei*. He should conceal nothing from them which it is essential to them to know. If he proposes to appropriate to himself any part of their funds as a reward for his services, or to derive advantage by selling to them at a profit, any contracts by which effect has been given to such purposes come, I cannot but think, within this protective enactment. Nor, as I venture to think, does the reasoning of Lord Justice James, when rightly weighed, militate against this position.

Subsequently to the decision in *Gover's Case* ⁽¹⁾, a judgment ⁵³⁹ adverse to the view I feel myself bound to adopt, and which I desire to treat with the utmost respect, but which, sitting here in a court of appeal, I am called upon to review, was pronounced by Vice-Chancellor Bacon in the case of *Craig v. Phillips* ⁽²⁾. There the defendant, having invited the plaintiff and others to join in a joint stock company for the purchase and working of a colliery, bought the colliery and then sold it at an advanced price to trustees for the company proposed to be formed. In the prospectus which he afterwards issued, and on which his name appeared as managing director, reference was made to the contract with the trustees, but none to the defendant's own purchase. The Vice-Chancellor held that the omission was not fraudulent within the 38th section of the act of 1867. In this judgment, for the reasons I have already detailed, taking, as I do, a different view of the effect of the statute, I am unable to concur.

Feeling myself, for the reasons I have given, unfettered by what may have been said in *Gover's Case* ⁽¹⁾, I desire to go further. I do not hesitate to say that had this case been on all fours with *Gover's Case* ⁽¹⁾, I should have adopted the view there taken by Lord Justice Brett. I think with him that the enactment of the 38th section was intended to be remedial. I think it was intended to protect the shareholder against deceptions too often practised in the creation of companies, by insuring him full information as to all the material circumstances attending the formation of the company he is invited to join, antecedently to the issuing of the prospectus. I am, therefore, of opinion that it was rightly left to the jury in the present case to say whether the contracts in question were material to the interests of the company,

⁽¹⁾ 1 Ch. D., 182.

⁽²⁾ 3 Ch. D., 722.

and material to be made known to the shareholder, and that, these questions having been found in favor of the plaintiff, the case was within the 38th section, and consequently that the decision of the divisional court in discharging the rule nisi for misdirection was right.

I proceed to consider whether there is any ground to quarrel with the verdict as not having been warranted by the evidence. Was the prospectus issued by the defendants? Was it issued by them as promoters? The solution of these questions depends in the first place on whether any special signification attaches to the *term "issuing" [540 or to the term "promoter." It is contended, on behalf of the defendants, that the issuing of the prospectus means the passing and publication of it by the directors, and that the issuing, by whosoever-hand effected, must be taken to be their act alone. Now there is nothing in the act to indicate the sense in which the term "issue" is used. I think it must be taken to mean the making the prospectus public, after its adoption, with a view to inviting persons to take shares and become members of the company. I agree in thinking that it must be taken to refer to an official publication, authorized by those who at the time have the government of the company, which in this instance would be the directors. It would otherwise not be the prospectus of the company. So authorized, the publication, by whomsoever actually carried into execution, would be the act of the directors, on the principle that the authorized act of an agent is always the act of the principal. But the act, though done by the authority of a principal, and in that sense the act of the principal, remains none the less in point of fact the act of the agent, and, if wrongful, makes the agent liable for its consequences. And here, if the issuing of the prospectus was in contravention of the statute, the act would be wrongful, and the party actually issuing would, I think, be responsible. Now, that in this sense the prospectuses, though issued nominally and officially by the directors, were in point of fact actually issued by the defendant Mr. Grant admits of no doubt. The printing and publication of the prospectus were effected under his immediate direction. But the complicity of the other defendants is not equally clear. All that appears is that as soon as the prospectuses were ready to be sent out, a large number were sent to them by Grant for the purpose of distribution. But the proof that all the defendants were acting throughout in concert is so strong that, though I could wish that the question had been left more specifically to the jury, I cannot

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quarrel with the finding, which includes all the defendants in the issuing of the prospectus.

But were the defendants promoters at the time of issuing? It is contended that, even if promoters in the outset, they ceased to be so the moment the company was constituted and the governing body, the directors, were appointed. 541] This contention was mainly *founded on a provision of the 7 & 8 Vict. c. 110, s. 3, which says that promoters shall continue to be such till the complete registration of the company, at which time directors would be appointed. But that act, which had reference to a system of registration widely differing from the present, has been repealed, and there is now no statutory limitation to the functions of a promoter. The question as to when one who in the outset was a promoter of a company continues or ceases to be so, becomes, therefore, as it seems to me, one of fact. A promoter, I apprehend, is one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose. That the defendants were the promoters of the company from the beginning can admit of no doubt. They framed the scheme; they not only provisionally formed the company, but were, in fact, to the end its creators; they found the directors, and qualified them; they prepared the prospectus; they paid for printing and advertising, and the expenses incidental to bringing the undertaking before the world. In all these respects the directors were passive; without saying that they were in a legal sense the agents of the defendants, they were certainly their instruments. All the things I have just referred to were done with a view to the formation of the company, and so long as the work of formation continues, those who carry on that work must, I think, retain the character of promoters. Of course, if a governing body, in the shape of directors, has once been formed, and they take, as I need not say they may, what remains to be done in the way of forming the company, into their own hands, the functions of the promoter are at an end. But, so long as the promoters are permitted by the directors to carry on the work of formation, the latter remaining passive, so long, I think, would a jury be warranted in finding that what was done by them was done as promoters. Here again, therefore, I see no reason for disturbing the verdict.

Next, was the prospectus issued by the defendants "knowingly," within the meaning of the section? It was contended that the term "knowingly" must be taken to

mean with a knowledge that the contracts were such as the statute required to be referred to: consequently, that, the jury having found that the mention of the contracts was omitted from the prospectus from a *bona fide* *belief [542 that such mention was unnecessary, the contracts had not been "knowingly" omitted. But this is to misconceive the meaning of the term. "Knowingly issuing" means neither more nor less than issuing with a knowledge of the existence of contracts within the section, and the intentional omission of them from the prospectus. Ignorance or mistake of the law cannot be admitted as an excuse for disobeying an act of Parliament.

I come, finally, to the question of damages. It is to be observed that no exception is taken to the question as left to the jury. It was left to them to say whether the loss sustained by the plaintiff amounted to the entire price paid for his shares, or to less than that amount, and to give damages accordingly. It is admitted that this was the right issue; nor is any objection taken to the direction of the judge, except that it is suggested that it might have been more full and explicit—a suggestion in which there might have been more weight if there had been fuller materials to which the observations of Lord Coleridge might have been directed. Nevertheless, when the grounds on which the verdict is questioned are more closely looked at, it becomes manifest that they do in substance involve a complaint of the direction of the judge, as not having brought to the attention of the jury the various elements into which the question of damages resolves itself.

The first contention on the part of the defendants is that the utmost loss which has accrued to the shareholders is that which they have sustained through the suppression of the contracts omitted from the prospectus, as to the £72,000 secured by them to the parties interested, and which has thus been added to the cost of the construction of the lines, which it is contended would equally have been constructed, but which would otherwise have been constructed at the lesser sum; and, consequently, that the utmost that the plaintiff can claim as damages is the proportion of that sum which his seventy shares bear to the 20,000 shares which form the sum total of the company. The shareholders, it is said, have got that which was to be the consideration for their money, namely, the tramway and the rolling stock; but they have got it dearer than it need have cost by £52,000. They are therefore entitled to a return to that amount, and the plaintiff to his *proportionate share, [543

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but no more. But this contention is founded on what appears to me to be a transparent fallacy. The complaint of the plaintiff is that he has been induced by a suppression in the prospectus, to which the statute attaches the character of fraud, to take shares in an undertaking, which, but for this suppression, he would not have joined, and which has turned out to be worthless—a fact which the jury have found in his favor. His grievance is not that he has paid too high a price, but that he has been induced to take shares which, but for the fraud, he would not have taken at all. He is, therefore, in the position of a person who has been induced to take shares and pay the price of them by a fraudulent misrepresentation, and he is, therefore, entitled to recover such damages as have resulted to him from taking such shares. If this damage extends to the entire price paid for the shares he is entitled to recover it.

But dismissing this contention as untenable, a more serious objection presents itself. Assuming that the plaintiff is entitled to have all the loss made good to him which has accrued upon his shares, when and how is that loss to be estimated?

A party who has been induced by fraudulent misrepresentation to purchase a given article, unless he rescinds the contract and returns the thing bought, which in such a case as the present it is admitted that the plaintiff is not in a position to do, can only recover damages to the extent of the loss he has actually sustained. He cannot recover the entire price he has paid, unless the thing prove wholly worthless. If the thing has any appreciable value, the damages must be reduced *pro tanto*. If the plaintiff's shares were of any value, that value, in assessing the damages, must be deducted from the price. Now, the first question which presents itself is as to the time at which that value, if any, is to be determined? Is the value to be sought at the time the shares were first acquired? or when, by his own voluntary act, the plaintiff put an end to the undertaking? or at the time when the action was brought? If the first, what was the value of the shares when issued? If the second, was the course taken by the plaintiff in causing the company to be wound up a reasonably proper course under the circumstances? For if the shares had at that time any value, and the plaintiff has, by his own act destroyed or diminished that value, he cannot throw the loss so occasioned on the defendants.

If, say the defendants, the undertaking was a genuine one, and would have succeeded if properly managed, but

has failed, and the value of the shares has been destroyed or diminished, as the case may be, not from any defects inherent in the original project, but from extrinsic causes (such as the bad management of those who had the conduct of its affairs, or from the change in the route, or from other causes), we are not liable in damages for any depreciation supervening from causes which we could not in reason have been expected to foresee. What if, here, the scheme would have proved successful, but the country had been invaded and the works destroyed by the enemy, or part of the line had been swallowed up by an earthquake, could the defendants have been held responsible? Or if, the success having been partial only, the value of the shares had become lessened through such a disaster happening, could the defendants be made to answer for more than the difference? It is not enough to say that but for the misrepresentation or fraud the purchaser never would have bought, and therefore would not have lost the thing bought. To recover back the whole price, if the thing had any value when bought, he must be in a condition to rescind the bargain and replace it, which here the plaintiff is not, as it is not in his power to make the company take back the shares, or in the power of the company to resume them.

If a man is induced by misrepresentation to buy an article, and while it is still in his possession, it becomes destroyed or damaged, he can only recover the difference between the value as represented and the real value at the time he bought. He cannot add to it any further deterioration which has arisen from some other supervening cause. If a man buys a horse, as a race-horse, on the false representation that it has won some great race, while in reality it is a horse of very inferior speed, and he pays ten or twenty times as much as the horse is worth, and after the buyer has got the animal home it dies of some latent disease inherent in its system at the time he bought it, he may claim the entire price he gave; the horse was by reason of the latent mischief worthless when he bought; but if it catches some disease and dies, the *buyer cannot claim the [545 entire value of the horse, which he is no longer in a condition to restore, but only the difference between the price he gave and the real value at the time he bought.

I should agree that the law as just stated should have been pointedly brought to the attention of the jury with a view to the damages, could I find in the facts of the case any materials to which it would be applicable. But I find none. The shares were wholly valueless at the time the

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action was brought. They were so when the company was put an end to. In fact they were so from the beginning, from radical defects inherent in the project from its birth. The project failed as at first proposed, because difficulties were found to exist which it would have required too great an expenditure of capital to overcome; in its second form, to which, be it observed, the defendants were equally parties, because the traffic was insufficient to afford a remunerative return. The shares may have had for a time some factitious value in the share-market; but the plaintiff, having invested, was not bound to sell, but was fully entitled to wait till the lines were actually worked. When practically tested the enterprise failed, and the shares proved worthless. The measure of damages is, consequently, the price the plaintiff was induced to give for them by the statutory fraud on which the action is founded.

If, indeed, there were reason to think that, upon another hearing, any of the facts to which reference has been theoretically made for the purpose of the argument could be established by the defendants, I should be disposed, looking to what occurred at the trial, to afford an opportunity for proving them by granting a new trial on payment of costs. I think it is much to be regretted that, when the defendants offered to submit to a verdict for the entire amount claimed, the plaintiff should have been allowed to go on, there being, in my opinion, no pretence for treating this as a test action, and the only purpose of such an action, as recognized by the law, being the recovering of damages. But the defendants need not have withdrawn. As they chose to do so, they must abide the consequences, and on this appeal must stand or fall by the facts as proved on the trial. Nor do I see any reason to think that these facts can be altered. The material facts, to which I have already 546] adverted, are too clear to be disputed, and *show the shares to have been from the beginning devoid of real intrinsic value. The defendants, it is true, suggested, not, indeed, as a fact on which they intended to rely, but as a reason for avoiding unnecessary exposure of the late company's affairs by a public inquiry, that some negotiation was on foot for obtaining fresh capital and reviving the undertaking with some advantage to the former shareholders. But of the actual existence of any such scheme, or prospect of its success, at the time of bringing the action, or even at the time of the trial, and still less since the trial, we have not a shadow of proof, and I can only treat it as visionary. Still less is there anything to show that any such negotiation

could resuscitate the defunct company, or give any appreciable value to their before worthless shares. If there existed any further facts beyond those proved at the trial, of which the defendants desired to take advantage, they might have been brought before the Divisional Court, or before us, on affidavit; but nothing of the sort has been attempted—a fact by which I cannot help being struck. My conviction is that if this cause were sent down to a new trial, the facts would remain unaltered, in which case the proper measure of damages would be that which has been awarded by the jury, namely, the full price of the shares. I see no ground, therefore, for sending the case to a new jury in respect of the damages.

For these reasons I am of opinion that this appeal should be dismissed.

BRETT, L.J.: I did not think it necessary to prepare a separate judgment, as I entirely concur in that just delivered by the Lord Chief Justice, both in its reasoning and in its results, and having had occasion in *Gover's Case* (1) to express my opinion fully on the subject, I have merely to say that subsequent consideration and all I have since heard urged in argument only induce me to adhere to the opinion I then expressed.

The court being equally divided, the judgment of the court below stands.

Judgment affirmed.

Solicitors for plaintiff: *Mercer & Mercer.*

Solicitors for Clark & Punchard: *Blunt & Co.*

(1) 1 Ch. D., 182.

[2 Common Pleas Division, 547.]

April 20, 1877.

EVANS V. LADY MOSTYN and Others. [547

Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), ss. 13, 41—Liability to fence abandoned Shafts—"Persons interested in the Minerals."

Sect. 13 of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), enacts that, where a mine to which the act applies is abandoned, or the working thereof is discontinued, the owner thereof and every other person interested in the minerals of the mine shall cause the top of the shaft to be securely fenced for the prevention of accidents,—provided that, subject to any contract to the contrary, the owner of the mine shall, as between him and any other person interested in the minerals of the mine, be liable to carry into effect this section: and by the interpretation clause (s. 41) "owner" means any person who is the immediate proprietor, or lessee, or occupier of any mine, and does not include a person who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or license for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mine.

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Whitehead v. Smithers.

The respondents, who were owners in fee of mines and minerals, demised a lead mine, part of the estate, for a term of years, subject to a rent or royalties, such royalties to be paid upon the place where the ore should have been gotten or weighed and before it should be taken away; the lease also reserving to the respondents powers of distress and re-entry if the royalties should be in arrear. The lessees ceased working the mine and left and allowed it to remain insufficiently fenced:

Held, that, although the lease was still in force and undetermined, the respondents were guilty of an offence under s. 18 as "persons interested in the minerals of the mine."

[2 Common Pleas Division, 553.]

June 15, 1877.

553] *WHITEHEAD, Appellant; SMITHERS, Respondent.

Wild Birds Protection Acts, 35 & 36 Vict. c. 78, and 39 & 40 Vict. c. 29—Sale of Birds imported from abroad.

It is no defence to an information under the Wild Birds Protection Act, 1876 (39 & 40 Vict. c. 29), for exposing wild birds for sale during the prohibited season, that such birds have been bought or received of or from a person residing out of the United Kingdom.

CASE stated by an alderman of the city of London under 20 & 21 Vict. c. 43.

Information by the appellant against the respondent, a poulterer in London, under s. 2 of 39 & 40 Vict. c. 29, "An act for the preservation of wild fowl" (hereinafter referred to as the act of 1876) ⁽¹⁾, charging that the respondent, in 554] the city of London, on *the 10th of April, 1877, unlawfully did have in his control and possession a certain wild fowl, to wit, a plover; then recently killed, contrary to the statute, &c.

The following facts were proved or admitted,—1, on behalf of the appellant, that one Read, on the 10th of April, 1877, purchased for 1s. 3d. at the shop of the respondent in Cannon street, city, a plover there exposed for sale, which had been recently killed,—2, on behalf of the respondent, that the plover so purchased was one of a consignment of

(1) The act 39 & 40 Vict. c. 29, recites that the wild fowl of the United Kingdom forming a staple article of food and commerce, have of late years greatly decreased in number by reason of their being inconsiderately slaughtered during the time they have eggs and young, and that owing to their marketable value the protection accorded to them by 35 & 36 Vict. c. 78, is insufficient.

By s. 2, "Any person who shall kill, wound, or attempt to kill or wound, or take any wild fowl, or use any boat,

gun, net, or other engine or instrument for the purpose of killing, wounding, or taking any wild fowl, or shall have in his control or possession any wild fowl recently killed, wounded, or taken, between the 15th of February and the 10th of July in any year, shall on conviction of any such offence before any justice or justices of the peace in England, &c., forfeit and pay for every such wild fowl so killed, wounded, or taken, or so in his possession," not exceeding £1 with the costs of the conviction.

dead plovers received by Mr. Howard, a poulterer, from Holland, and by him sold to the respondent.

On the part of the respondent it was contended that the plover in question, being a foreign wild fowl, and killed abroad, the case did not come within the act of 1876.

On the part of the appellant it was contended that the provisions of the act of 1876 were designed to enlarge and extend the protection of wild fowl of the United Kingdom.

The Alderman came to the conclusion,—

1. That the act of 1876, as appears by the preamble, was for the preservation of wild fowl of the United Kingdom only, and that for their marketable value as an article of food and commerce.

2. That the wild fowl in question, a plover, having been bought or received of or from some person or persons residing out of the United Kingdom, was not proved to be a wild fowl of the United Kingdom; and on these two findings he dismissed the summons.

The questions for the opinion of the court were: 1st. Whether the act of 1876 makes it an offence for any person to have in his control or possession within the prohibited time a wild fowl recently killed, &c., although such wild fowl shall have been bought or received of some person or persons residing out of the United Kingdom: 2d. Whether s. 2 of the act of 1876 applies to the control or possession (by exposing or offering for sale in a shop) *of a [555 wild fowl recently killed within the prohibited time, such exposing or offering for sale being a distinct offence in itself punishable under s. 2 of the act of 1872⁽¹⁾, if such wild fowl be not bought or received of or from some person or persons residing out of the United Kingdom.

Waddy, Q.C. (*Bund* with him), for the appellant: The exemption in the act of 1872 of birds bought or received of or from persons residing abroad rendering the provision abortive, the act of 1876 was passed to remedy the defect,

⁽¹⁾ By 35 & 36 Vict. c. 78, s. 2, "Any person who shall knowingly or with intent kill, wound, or take any wild bird, or shall expose or offer for sale any wild bird recently killed, wounded or taken, between the 15th of March and the 1st of August in any year, shall on conviction of any such offence before any justice or justices of the peace in England, &c., for a first offence be reprimanded and discharged on payment of costs and summons, and for every subsequent offence for-

feit and pay for every such wild bird so killed, wounded, or taken, or so exposed or offered for sale, such sum of money as, including costs of conviction, shall not exceed 5s., as to the justice or justices shall seem meet, unless he shall prove to the satisfaction of the justice, that the said wild bird was bought or received on or before the said 15th of March, or of or from some person or persons residing out of the United Kingdom."

and to impose a penalty upon any person who shall kill or take or have in his control or possession, within the prohibited period, any wild bird recently killed. The only way of effectually protecting wild fowl of the United Kingdom is, to prevent their being slaughtered and exposed for sale under the name of foreign birds.

Reginald Brown, for the respondent: The act of 1872 not being repealed by the act of 1876, both must be read together; and, as there is then no repugnancy between the two acts, the exemption of wild fowl bought or received from abroad must be taken still to subsist: *Dwarris on Statutes*, 2d ed., 532, 533. The preamble of the act of 1876, and the provisions in s. 3 enabling the Home Secretary, upon the application of the justices in quarter sessions, to extend or vary the time during which the killing and taking wild fowl is prohibited by the act, show that these statutes (like 1 & 2 Wm. 4, c. 32, as to the killing or being in possession of game), are applicable only to British birds.

LORD COLERIDGE, C.J.: I am of opinion that the decision of the justice in this case was wrong, and that there must 556] be a conviction. *The question arises upon two acts of Parliament passed for the protection of wild fowl, viz., 35 & 36 Vict. c. 78, and 39 & 40 Vict. c. 29. Sect. 2 of the first-mentioned act enacted that any person who should kill or take any wild bird, or expose or offer for sale any wild bird recently killed or taken, between the 15th of March and the 1st of August, should incur a *penalty of 5s.*, "unless he should prove to the satisfaction of the justice that the bird was bought or received on or before the 15th of March, or of or from some person residing out of the United Kingdom." Under that statute it was an answer to an information of this sort if the person charged could prove that the bird which he exposed or offered for sale was bought or received by him of or from some person residing out of the United Kingdom. Then came the act of 1876, which recited that the protection accorded to wild fowl by the act of 1872 was insufficient, and that it was expedient "to provide for their further protection during the breeding season;" and s. 2 enacts that any person who shall kill or take, "or shall have in his control or possession," any wild fowl recently killed or taken, between the 15th of February and the 10th of July, shall on conviction forfeit and pay for every such wild fowl so killed, &c., or so in his possession, not exceeding £1. It has been urged that, inasmuch as the second act does not in terms repeal the first act, the two are to be read together, and consequently, it

having been proved that the plover in question was bought by the respondent of a person residing in Holland, that is an answer to an information under the later act. I am of opinion that that argument is not well founded. It is said that it would be a strong thing for the Legislature of the United Kingdom to interfere with the rights of foreigners to kill foreign birds. But it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as of protecting other British interests, is by interfering indirectly with the proceedings of foreign persons. The object is, to prevent British wild fowl from being improperly killed and sold under pretence of their being imported from abroad. It has been said that the second statute cannot be held to operate as a repeal of the first, because there is no contrariety or repugnancy in the two acts. The act of 1876, however, refers in terms to the act of 1872, and declares that the protection afforded *by it to the wild birds was insufficient, and that it is [557] expedient to provide further for their protection. The new provision is evidently framed carefully for the purpose of enlarging the former, which had proved in great measure abortive. The very question now before the court arose in *Michell v. Brown*⁽¹⁾. The act 19 Geo. 2, c. 22, s. 1, imposed a penalty for the offence of throwing ballast, &c., into navigable rivers; a subsequent statute, 54 Geo. 3, c. 159, s. 11, provided a different punishment for the same offence, and prescribed a different mode of procedure; and it was held that the later enactment impliedly repealed the former, notwithstanding its preamble recited the expediency of repealing certain other statutes (which were repealed) and the expediency only of extending the 19 Geo. 2, c. 22. Lord Campbell, delivering the judgment of the court, said⁽²⁾: "If a later statute again describes an offence created by a former statute, and affixes a different punishment to it, varying the procedure, &c., we think that the prosecutor must proceed for the offence under the later statute. If the later statute expressly altered the quality of the offence, as, by making it a misdemeanor instead of a felony, or a felony instead of a misdemeanor, the offence could not be proceeded for under the earlier statute; and the same consequence seems to follow from altering the procedure and the punishment. The later enactment operates by way of substitution, and not cumulatively, giving an option to the prosecutor or the magistrate." That in principle is very

⁽¹⁾ 1 E. & E., 267; 28 L. J. (M.C.),
53.

⁽²⁾ 1 E. & E. at p. 274; 28 L. J. (M.C.),
at p. 55.

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much in point with the present case. I think the respondent ought to have been convicted.

GROVE, J.: I am of the same opinion. The whole frame of s. 2 of the Act of 1876 shows that it is intended as a substitution for s. 2 of the Act of 1872. The preamble declares that the protection afforded by the former act was insufficient, and it was expedient to increase it. Sect. 2 of the Act of 1872 enacted that any person who should kill or take, or expose or offer for sale, any wild bird recently killed, between the 15th of March and the 1st of August, should on conviction forfeit for every such bird so killed or exposed 558] or offered for sale, 5s., "unless he should prove *that the bird was bought or received on or before the 15th of March, or of or from a person residing out of the United Kingdom." Sect. 2 of the Act of 1876 alters the period of limitation, and also the penalty: it enacts that any person who shall kill or take, or shall have in his control or possession, any wild fowl recently killed or taken, between the 15th of February and the 10th of July, shall for every such wild fowl, &c., forfeit a sum not exceeding £1,—making no mention of the exception as to its purchase from a foreigner. It is an entirely new section, and, though framed for a similar object, differently worded, and of increased stringency. It could not be consistently engrafted upon the former statute. The two questions put to us must be answered in the affirmative; but, as there has been no conviction, there will be no costs.

Judgment for the appellant.

Solicitor for appellant: *A. Leslie.*

Solicitor for respondent: *G. E. Philbrick.*

[2 Common Pleas Division, 562.]

April 27, 1877.

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*CALDOW V. PIXELL.

Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 29—Construction of Statute—Directory or Imperative—Ecclesiastical Dilapidations—Direction of Bishop to Surveyor to inspect and report more than Three Months after avoidance of Benefice.

By the Ecclesiastical Dilapidations Act, 1871, s. 29, "within three calendar months after the avoidance of any benefice . . . the bishop shall direct the surveyor, who shall inspect the buildings of such benefice, and report to the bishop what sum, if any, is required to make good the dilapidations to which the late incumbent or his estate is liable":

Held, that the provision as to the time within which the bishop is to direct the surveyor to inspect and report upon the buildings of a benefice after its avoidance

is directory only, and not imperative; and that a direction to inspect and report made by a bishop more than three months after the avoidance of a benefice may be valid.

SPECIAL CASE stated pursuant to a master's order.

The action was brought to recover the sum of £117 16s. 6d., for dilapidations in respect of the benefice of Skirwith, in the diocese of Carlisle, of which the plaintiff was the new incumbent, and the defendant the late incumbent. The defendant resigned the benefice on the 3d of July, 1874, and the plaintiff was admitted thereto on the 6th of January, 1875. The bishop, on the 10th of November, 1874, more than three months after the avoidance of the benefice by the defendant's resignation, directed the surveyor of ecclesiastical dilapidations for the diocese to inspect the buildings of the benefice, and to report what sum was required to make good the dilapidations. The surveyor accordingly inspected the buildings, and made a report to the bishop stating that the aforesaid sum of £117 16s. 6d. was required to make good the dilapidations to which the defendant was liable. On the 31st of March the bishop made an order stating that sum as the sum for which the defendant, as the late incumbent of the benefice, was liable. The defendant declined to pay the amount, on the ground that the order was bad, by reason of the lapse of more than three months between the times of his resignation and of the direction to inspect.

The question for the court was whether the plaintiff was *entitled to recover from the defendant by virtue of [563 the order the said sum of £117 16s. 6d.

April 26, 27. *F. W. Gibbs*, for the plaintiff: The question to be determined is whether it is imperative that the direction to inspect and report shall be given within the limit of three months mentioned in the Ecclesiastical Dilapidations Act, 1871, s. 29 (''); it was noticed, but not decided,

(1) By the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 29, "within three calendar months after the avoidance of any benefice . . . the bishop shall direct the surveyor, who shall inspect the buildings of such benefice and report to the bishop what sum, if any, is required to make good the dilapidations to which the late incumbent or his estate is liable."

Sect. 31. "The report shall state what works, if any, are, in the opinion of the surveyor, needed, . . . and shall state what sum, in the opinion of the surveyor, will be required to make good the dilapidations."

Sect. 34. "The bishop shall, . . . after consideration of the whole matter, make an order, stating the repairs and their cost, for which the late incumbent, his executors or administrators, is or are liable."

Sect. 36. "The sum stated in the order as the cost of the repairs shall be a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable as such at law or in equity."

Sect. 53. "No sum shall be recoverable for dilapidations in respect of any benefice becoming vacant after the commencement of this act, and to which

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in *Gleaves v. Marriner* (*). The effect of the statute was much discussed in *Wright v. Davies* (*), and it is plain from the decision in that case that the Legislature did not intend to limit the right to sue, but merely to provide a better machinery: and it would be inconsistent with that intention to hold that the remedy of the new incumbent is taken away by the default of the bishop, when no such limitation upon his right to sue existed under the former law. The effect of holding the period of three months to be imperative is to cast upon the plaintiff the cost of all the repairs.

The primary object of the Legislature was that the buildings of a benefice should be kept in repair; this object may be defeated if s. 29 be imperative, and therefore it ought to be construed as only directory: *Re a Coroner for Stafford* (*). The delay in ordering the surveyor to inspect and 564] report was occasioned by the *default of a person to whom was committed the discharge of a public duty, and this is a further reason for holding that the statute is not imperative: *Rex v. Sparrow* (*), explained in *Rex v. Loxdale* (*); *Rex v. Justices of Denbighshire* (*); *Rex v. Mayor of Norwich* (*); *Mayor of Rochester v. Reg.* (*); *Reg. v. Inghall* (*).

Stavelly Hill, Q.C. (*John Edge* with him), for the defendant: Even under the former law the Statute of Limitations might become a bar to the right of a new incumbent to sue; and the amount to be recovered for dilapidations became less if a delay took place in bringing the action, Cripps's Law of the Church and Clergy, p. 318; therefore no reason deduced from the analogy of the former law exists for holding that the Legislature intended the provision as to time in s. 29 to be directory. When a statute enacts that an act may be done for the benefit of an individual within a limited time, the act must be done within that specified time; and that principle applies here, for the main object of the Ecclesiastical Dilapidations Act, 1871, was to provide for the benefit of a new incumbent. The authorities cited for the plaintiff are not in point, for they relate to acts done for the benefit of the public in execution of statutory powers. The procedure

this act shall be applicable, unless the claim for such sum be founded on an order made under the provisions of this act."

(*) 1 Ex. D., 107.

(*) 1 C. P. D., 638.

(*) 2 Russ., 475, at p. 483, per Abbott, C.J.

(*) 2 Str., 1128.

(*) 1 Burr., 445, at pp. 447, 449, 450.

(*) 4 East, 142.

(*) 1 B. & Ad., 310.

(*) E. B. & E., 1024; 27 L. J. (Q.B.), 484.

(*) 2 Q. B. D., 199.

created by any statute relating to the established church must be rigidly followed in all its incidents: *Vaux v. Vollans* ('); *Howard v. Bodington* ('). Where an act is to be done by a court held at a specified time, it cannot be done by a court held at a subsequent time: *Bowman v. Blyth* (').

[DENMAN, J.: The real question in *Bowman v. Blyth* (') was as to the power of a court of quarter sessions to adjourn to a subsequent sitting the consideration of a matter, which they were directed by statute to determine on a specified occasion; this is pointed out by Mellor, J., in *Lewis v. Davis* (').

LOPES, J.: In some of the authorities cited for the plaintiff the *decision turned upon the question of con- [565
venience. *Reg. v. Ingall* (') is, in my opinion, very much in point for the facts before us, and in that case the judges of the Queen's Bench Division seem to have struck a balance between the inconvenience of holding a statute to be imperative and the risk of allowing injury to be done by holding it to be directory.]

Reg. v. Ingall (') was really decided upon the ground that the appellants had not been damnified, for they had obtained all the redress which they could have gained if there had been no delay. If the period of three months mentioned in s. 29 may be exceeded, a direction to inspect and report may be made at any time, however distant after the avoidance of a benefice; and it follows, that if a direction be made even one day after the expiration of that period it will be bad; in the present case the direction to inspect and report was made more than four months after the avoidance, and therefore the order of the bishop will not sustain the action.

Further, s. 53, which takes away the old remedy, shows that the new machinery must be strictly followed.

Gibbs did not reply.

DENMAN, J.: In my opinion the plaintiff is entitled to our judgment. The question raised in this case is that thrown out in *Gleaves v. Marriner* ('), but not there decided; it was briefly alluded to by Bramwell and Amplett, BB. (p. 109); they certainly expressed no definite opinion, but they appeared to entertain doubts whether the limitation of three months is imperative as regards the bishop. It was held in *Gleaves v. Marriner* (') that the statute did not fix a time within which the surveyor is to inspect and report;

(') 4 B. & Ad., 525.

(') 2 P. D., 203.

(') 7 E. & B., 26; 26 L. J. (M.C.), 57; in Ex. Ch., 7 E. & B., 47; 27 L. J. (M.C.), 21.

(') Law Rep., 10 Ex., 86, at p. 91.

(') 2 Q. B. D., 199.

(') 1 Ex. D., 107.

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but it has been argued before us on behalf of the defendant that if the bishop does not direct the surveyor within the three months, no order can be made under the statute against the late incumbent; and it has been contended that the delay of even one day after the expiration of the three months will make the order by the bishop invalid. Our attention has been called to s. 53, as showing that the order upon which the plaintiff relies will not support the present 566] action. But I think *that this is too stringent a construction of the words in that section "under the provisions of this act." Many decisions are to be found in which emphatic words such as "acts done in pursuance of this act," or "acts under the authority of this act," have been held to justify acts done not in strict compliance with the terms of a statute, but done with a *bona fide* intention of carrying out its provisions. The principle of these cases seems to apply here, and I therefore think that s. 53 is not fatal to the plaintiff's case.

I will now return to s. 29, and I may say that the rules for ascertaining whether the provisions of a statute are directory or imperative are very well stated in Maxwell on the Interpretation of Statutes: thus, at pp. 330, 331, it is laid down that the scope and object of a statute are the only guides in determining whether its provisions are directory or imperative, and the judgment of Lord Campbell in *Liverpool Borough Bank v. Turner* (*) is cited in support of this proposition; at pp. 333, 337, the distinction between statutes creating public duties and those conferring private rights is pointed out, and it is stated that in general the provisions of the former are directory, but of the latter imperative; and at p. 340 it is laid down that in the absence of an express provision the intention of the Legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative. Upon applying the principles here set forth I come to the conclusion that s. 29 is to be construed as directory and not as imperative. The statute did not confer for the first time the power to sue for dilapidations; the right had previously existed for the benefit of the incumbent, but the Legislature thought fit to modify this right by empowering a new incumbent to bring an action of debt on behalf of himself and the benefice. The statute imposes a public duty upon the bishop, it does not create a power or privilege for the benefit of the new incumbent as a private person. The bishop probably from inadvertence failed to give the direction within the specified time; but as

(*) 2 De G. F. & J., 502; 30 L. J. (Ch.), 379.

this was an omission to perform a public duty, I think we ought to hold this statute to be directory.

Upon another ground it seems to me that the plaintiff is entitled to succeed, and that is, the question of convenience. The whole *scope and object of the act must be [567 looked at, and then it will be seen that great inconvenience may be occasioned and great injustice may be done, if the period of three months can in no case be extended; in that event if the bishop allowed one day to go by, the late incumbent would escape all liability, although very serious dilapidations might exist in the buildings of the benefice. The default of a public officer in the discharge of the duty committed to him might defeat the object of the statute. All cases cited on behalf of the plaintiff as to the non-appointment of a public officer are open to this observation, that in them by the failure to appoint an injury was inflicted upon many persons; here the injury was, at least in the first instance, inflicted upon one person only, the defendant; but although these cases may not go the full length necessary to enable the plaintiff to succeed, yet not one of them lays down that it is a material question whether the failure to perform a public duty affects a greater or less number of persons. I therefore think them the same in principle with the present. *Howard v. Bodington* (*) appears to be most in favor of the defendant, but it is clearly distinguishable; there the suit was of a criminal nature, and as the defendant did not appear it was necessary to show that he had received a copy of the representation against him within the limited time; it was held that as the limited time had been exceeded the suit failed. I do not think, however, that the principle applies here, as in that case the proceedings were of a penal nature. Upon the same ground I think that *Vaux v. Vollans* (*) is distinguishable. These two authorities, therefore, are not really in point for the defendant. The cases cited before us establish that, where a public officer is directed by a statute to perform a duty within a specified time, the provisions as to time are only directory, and also that in considering whether a statute is imperative, a balance may be struck between the inconvenience of rigidly adhering to, and the inconvenience of sometimes departing from, its terms. For these reasons I think that the plaintiff is entitled to judgment.

LOPES, J.: The question which has been discussed before us is of some importance, but after weighing the arguments upon each *side I think that the plaintiff is entitled [568

(*) 2 P. D., 203.

(*) 4 B. & Ad., 525.

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to succeed. I need not repeat the reasons which have been assigned by my Brother Denman, and it is necessary only to say that our decision must depend upon whether the Legislature has made it essential for the bishop to give the direction to the surveyor within the prescribed period of three months. [The learned judge read the words of s. 29.] In construing the statute we must strike a balance between the inconvenience of holding the direction of the bishop and the proceedings subsequent thereto to be null and void, and the inconvenience of giving effect to the direction when it has been made after the prescribed time. It seems to me that the more objectionable course is to construe the statute as imperative, for by so doing the defendant, from no default of the plaintiff, would escape from the payment of a sum which he omitted to expend in keeping the buildings of the benefice in repair. I therefore think that the provision as to the time mentioned in s. 29 is directory only and not imperative.

Judgment for the plaintiff.

Solicitors for plaintiff: *Gray & Mounsey*, for Mounsey & Co., Carlisle.

Solicitors for defendant: *Miller & Smith*, for Thorne, Smith & Thorne, Wolverhampton.

[2 Common Pleas Division, 572.]

June 28, 1877.

572] *SIDDON'S and Another v. SHORT, HARLEY & Co., and Others.

Sale of Land—Implied Covenant for Adjacent and Subjacent Support—Injunction to restrain Acts calculated to endanger.

The vendor of land adjoining other land of his own under which are mines and minerals, and who knows at the time of the sale that the vendee is about to erect upon the land so purchased substantial buildings, impliedly covenants that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant.

A. sold land to B. for the purpose of an iron foundry. Adjoining the land so sold to B., A. had other land under which was coal. A. afterwards leased the minerals to C., who commenced working the coal within such a distance from the land of B. as to be reasonably calculated to endanger its stability:

Held, ground for an injunction against A. and C., although no actual damage had been sustained by B.

CLAIM stating that the plaintiffs were iron founders carrying on business in partnership at West Bromwich, Staffordshire, and, in the commencement of 1876, were desirous of erecting an iron foundry and other buildings for the purpose of their business.

2. The defendants James and Isaac Whitehouse were then the owners of a piece of land of about nine acres situate at Harvells Hawthorn, West Bromwich, and on which buildings were then standing, and of lands adjoining thereto, under both which pieces of land were mines of coal and other minerals which had, as the said defendants then well knew, been partially gotten.

3. The plaintiffs applied to the defendants for the sale to them by the defendants of the piece of land of nine acres, for the purpose of erecting thereon the said works and buildings, and informed the said defendants of the purpose for which they required the same: and it was at the time of the sale and conveyance of the land hereinafter mentioned fully known to the said defendants that the plaintiffs required the land for the purpose of erecting thereon an iron foundry and other buildings connected therewith.

4. On the 23d of February, 1876, the defendants conveyed to the plaintiffs in fee simple the piece of land of nine acres together with the buildings thereon.

5. The plaintiffs thereupon commenced the erection of the iron foundry and buildings on the land so [573 conveyed to them; and had previously to October, 1876, erected a considerable portion thereof, but had not yet completed the same.

6. There was in the adjoining land an ungotten portion of a seam of thick coal. It was necessary for the support of the land of the plaintiffs that the mines and minerals in the adjoining land should not be worked and gotten at all within a distance of fifty yards at least from the boundary of the plaintiffs' land; and in particular it was necessary for the purpose that no part of the ungotten portion of the seam of thick coal should be worked and gotten within the said distance; and, if any part of the mines and minerals, and in particular if any part of the thick coal was worked and gotten within this distance, the land of the plaintiffs would subside, and the buildings thereon be cracked, injured, and destroyed, and the plaintiffs' business interrupted and injured.

7. The land would so subside as aforesaid although no buildings were placed thereon; but, if otherwise, the plaintiffs allege that under the circumstances they are notwithstanding entitled to necessary support from the adjoining land for the said land and the buildings which they have erected and are about to erect thereon.

8. In or about the 11th of November, 1876, the defendants Whitehouse let to the other defendants, Short, Harley &

Co., for a term of three years from the 4th of November, 1876, a part of the ungotten mines and other minerals situate within fifty yards of the plaintiffs' boundary, including the ungotten portion of the seam of thick coal situate within the said distance, with the right to get and raise the same.

9. The plaintiffs, before the granting of the lease, remonstrated with the defendants Whitehouse, and with the defendants Short, Harley & Co., and objected to their proceeding to work and get the mines and minerals; but the defendants Short, Harley & Co., nevertheless, with the sanction and license of the defendants Whitehouse, and under the said tenancy, proceeded to drive gate-roads for the purpose of getting the minerals, and have in fact driven the same within the said distance of fifty yards, and were before the commencement of this action about to work and 574] *get the mines and minerals, and particularly the thick coal within the distance of fifty yards.

10. Shortly after the commencement of this action a fire broke out in the Warr Hill Colliery, from the pit of which the workings were being carried on, and the same were necessarily and have been since stopped and suspended; but the defendants respectively threaten and intend to recommence and continue the workings, and to suffer and permit the same to be recommenced and continued when and as soon as it shall become possible to work in the pit, and also to proceed to work and get and to permit to be worked and gotten the mines and minerals, and in particular the thick coal, within the distance of fifty yards.

The plaintiffs claim an injunction to restrain the defendants, Short, Harley & Co., their agents and workmen, from working mines of coal or other minerals adjacent or near to the plaintiffs' land and premises, in such a manner as to cause any subsidence or alteration of the surface of the plaintiffs' land, or of the buildings that now are or that may be hereafter erected thereon by the plaintiffs for the purpose of their business, and from working any such mines or minerals within fifty yards of the plaintiffs' land.

And to restrain the defendants James and Isaac Whitehouse from working or allowing to be worked by themselves, their lessees, tenants, agents, or workmen, the mines of coal or other minerals adjacent or near to the plaintiffs' land and premises, in such a manner as to cause any subsidence or alteration of the surface of the plaintiffs' land, or of the buildings that now are or that may be erected thereon by the plaintiffs for the purpose of their business, and from working or allowing to be worked by themselves, their les-

sees, tenants, agents, or workmen, any such mines or minerals within fifty yards of the plaintiffs' land. Demurrer.

Griffits, Q.C. (Arundel Rogers with him), in support of the demurrer: The statement of claim does not disclose enough to warrant an absolute injunction at once and before any actual damage is done. In *Smith v. Thackerah* (*) it is laid down that the right of the owner of land to the lateral support of his neighbor's *land is not an absolute right, and the infringement of it is not a cause of action without appreciable damage. In *Pattison v. Gilford* (**) it was held that, in order to obtain an injunction restraining a threatened act on the ground that, if done, it will be a violation of some legal right, the plaintiff must show that the act *must* result in a violation of such right. Jessel, M.R., adopting the *dictum* of Lord Cottenham, C., in *Emperor of Austria v. Day* (*): "The court has jurisdiction by injunction to protect property from an act threatened, which, if completed, would give a right of action. I by no means say that in every such case an injunction may be demanded as of right; but, if the party applying is free from blame and promptly applies for relief, and shows that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, an injunction will be granted." Here, the statement neither discloses an appreciable damage nor that any damage is imminent; nor does it allege that the consequences which the plaintiffs apprehend might not be compensated in damages. At all events, the plaintiffs are not entitled to support for their buildings.

Anstie, contra: The ground upon which the injunction is prayed here is, that the threatened proceedings of the defendants are in derogation of the grant of the land to them; and their claim is warranted by the several decisions of the House of Lords, in *Caledonian Ry. Co. v. Sprot* (*), *Elliot v. North Eastern Ry. Co.* (*), and *Great Western Ry. Co. v. Bennett* (*). In the first it was held that a conveyance of land to a company for the purpose of constructing a railway gives the company a right by implication to all reasonable subjacent and adjacent support connected with the subject-matter of the conveyance; and therefore that, although in the conveyance to the company the minerals are reserved, the grantor is not entitled to work them,

(*) Law Rep., 1 C. P., 564.

(*) Law Rep., 18 Eq., 259, at p. 263.

(*) 3 D. F. & J., 217, 240.

(*) 2 Macq., 449.

(*) 10 H. L. C., 333.

(*) Law Rep., 2 H. L., 27.

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even under his own land, in such a manner as to be calculated to endanger the railway: *Elliott v. North Eastern Ry. Co.* (*) was to the same effect. *Great Western Ry. Co. v. Bennett* (†) turned upon the construction of the Railways 576] Clauses Consolidation Act, 1845 (8 & 9 *Vict. c. 20), and in no degree qualified the general principle laid down in the previous cases. *Smith v. Thackerah* (‡) was a common law action before the passing of the Judicature Acts, which give courts of law concurrent jurisdiction in this respect with the Court of Chancery. It is enough to entitle the plaintiffs to the injunction prayed, to show reasonable grounds for apprehending damage from the threatened working by the defendants of the minerals: *Hext v. Gill* (§).

Griffiths, Q.C., in reply: The cases cited have no application. They were all cases of the taking of land under a statutory authority for a specific purpose, viz., to construct a railway, and therefore a reservation or grant of a right to subjacent support might well be implied. Here, however, there can be no such implication: the parties have entered into specific covenants, and have not provided for adjacent or subjacent support for their land, still less for their buildings. At all events, before an injunction can be granted it must be shown that the danger sought to be guarded against is imminent, or that some evident damage has been done.

GROVE, J.: I am of opinion that a sufficient case for an injunction is disclosed on the statement of claim. Putting the buildings out of the question, the claim avers that land was conveyed to the plaintiffs, and that it is necessary for the support of their land that the mines and minerals in the adjoining land (which belonged to the grantors) should not be worked and gotten at all within a distance of fifty yards at least from the boundary of the plaintiffs' land, and that, if any part of the said mines and minerals be worked and gotten within that distance, the land of the plaintiffs will subside. It then goes on to allege that, after the grant of the land to them, the grantors leased to the other defendants a portion of the ungotten mines and other minerals situate within fifty yards of the plaintiffs' boundary, who with the sanction and license of the grantors proceeded to drive gate-roads for the purpose of getting the mines and minerals, and have in fact driven the same within the said distance of fifty yards. The injunction is sought *quia timet*, to re-577] strain the defendants from working or *allowing the

(†) 10 H. L. C., 333.

(‡) Law Rep., 2 H. L., 27.

(§) Law Rep., 1 C. P., 584.

(§) Law Rep., 7 Ch., 699.

mines to be worked near to the plaintiffs' land in such a manner as to cause any subsidence or alteration of the surface of the plaintiffs' land. To entitle them to succeed in this, they must make out a reasonable and probable case of injury to their land from the working of the mines. The claim shows a commencement of working and excavating, and a threat to continue it. It does not, it is true, show any actual existing damage to the land. That, however, is not necessary: it is enough to show a reasonable probability of damage. If the matter had depended upon the land alone, I think a sufficient case is disclosed to warrant the court in granting an injunction. But it is said that there is no allegation that the damage apprehended is not of such a nature as to be capable of being satisfied by damages. I do not take that to be any ground for refusing an injunction. A man has a right to have the land as he bought it. If the apprehended damage be in its nature inconsiderable, the case may be different. Then, as to the buildings,—The inclination of my opinion is that the cases upon the subject go to this, that, where a man parts with land knowing that substantial buildings are intended to be erected upon it, he impliedly engages so to use his adjoining land as not to injure or interfere with those buildings. Upon both grounds, therefore, I think the demurrer must be overruled.

Demurrer overruled. .

Solicitors for plaintiff: *J. & F. Needham*, for G. & A. Caddick, West Bromwich.

Solicitors for defendants: *Rhodes & Son*, for Seaman, Wednesbury.

See 17 Eng. Rep., 300 note; 17 Eng. Rep., 380 note; 20 Eng. Rep., 343 note; *ante*, p. 332 note.

[2 Common Pleas Division, 578.]

July 12, 1877.

578] *SHEPHERD and Others v. KOTTGEN and Others (*).

Shipping—General Average—Sacrifice of part of Vessel injured by Perils of the Seas and dangerous to whole Adventure—Mere possibility of saving injured Part—“Wreck.”

A claim for a general average contribution must receive a liberal construction; and therefore where a part of a vessel has been injured by the perils of the seas, and has thereby become dangerous to her and her cargo, the mere possibility of saving the injured part will be sufficient to render its sacrifice, for the purpose of saving the whole adventure, a general average loss; and, provided the injured part at the moment of sacrifice is of some value, the right to contribution arises, although it would probably have become at a subsequent time useless and of no value if it had been allowed to remain affixed to the vessel.

For the purposes of general average contingent wreck is not to be treated as actual wreck.

Whilst on a voyage to H. a vessel met with a storm, which caused parts of the rigging to give way; the mainmast in consequence began to lurch violently, and was cut away by the captain's orders for the purpose of preventing it from tearing up the vessel and sacrificing the whole adventure; the mast might possibly have been saved if the weather had moderated quickly; the vessel, having outlived the storm, was repaired at a port of refuge, and proceeded on her voyage to H., where she delivered her cargo. An action having been brought by the owners of the vessel against the owners of the cargo for a general average contribution for the loss of the mast, at the trial the judge asked the jury whether at the time of sacrifice the mast was virtually a wreck and valueless; but he did not ask them to find whether, if the weather had moderated, the mast could possibly have been saved, nor did he ask them to find whether the mast was cut away to save the adventure, or as a mere innumbrance:

Held, a misdirection.

THE writ was issued on the 13th of August, 1875.

The declaration contained special and common counts for a general average loss incurred by the sacrifice of large portions of the plaintiffs' ship, her masts, rigging, tackle, and apparel, during a voyage from London to Hong Kong.

The only material plea was “never indebted,” upon which issue was joined.

The cause came on for trial in London during the Hilary Sittings, 1877, before Manisty, J., and a special jury. It appeared that the plaintiffs' bark Rollo sailed from London with a general cargo, the defendants having shipped goods on board of her. Not many days after starting she met with a heavy gale, during which the mainmast was cut 579] away, under the circumstances detailed in the *judgment; the Rollo then ran before the gale until the weather moderated. Ultimately she was towed by a steam vessel to Lisbon, where she was repaired; she afterwards

(*) Reversed, see next case.

proceeded on her voyage to Hong Kong, and there delivered her cargo.

The other facts are sufficiently stated in the judgment.

A verdict having been found for the defendants, a rule was obtained for a new trial, on the ground of misdirection, and on the further ground that there was no evidence to justify the verdict, and that the verdict was against the weight of evidence.

June 21, 23. *C. P. Butt*, Q.C., and *J. C. Mathew*, showed cause. *J. A. McLeod* and *H. Sutton* supported the rule.

The arguments are sufficiently stated in the judgment.

Cur. adv. vult.

July 12. The judgment of the Court (Grove and Lopes, JJ.) was delivered by

GROVE, J.: This was an action by shipowners against the owners of cargo,—really by the underwriters on the ship against the underwriters on the cargo.

The only question for our consideration was, whether the cutting away of a mast under the circumstances detailed in the evidence was a subject for general average contribution or not.

The evidence for the plaintiffs was mainly that of the captain of the ship *Rollo* and the first and second mates, taken on commission.

For the defendants four experts were called, who gave their evidence upon hearing that for the plaintiffs read. Some letters of the captain and the log were also put in: but these do not vary the evidence so far as it is material for our decision.

The vessel was bound for Hong Kong, and somewhere between Scilly and Lisbon she encountered a storm; portions of the rigging gave way, and from this cause the mainmast was, in the captain's language, lurching violently. He says "We wore the ship to try to save the mast. The mainmast was lurching violently. The mainmast would not break. We wanted it to break, for the simple reason that it was lurching so heavily that I was afraid it would open the ship out. I ordered the chief mate to cut away *the port [580] rigging so that it might fall to starboard clear of the ship. The mate obeyed my order." On cross-examination, he says,—“As soon as the starboard main rigging was gone, I knew the mast was gone, unless we could secure the starboard main rigging. The whole difficulty was that the mast would not break. I was afraid the mast would break the ship out.” Re-examined,—“The mast was lurching so much

as to put the ship in danger of opening up." Question: "If the mast had not been lurching so much, could you have secured the mast?" Answer: "Yes."

The mate being asked, "Why did you want to cut the mast away?" says,—“To save the ship and cargo, and our lives, I should think. The mast was lurching about so violently, I expected it would rip up the decks. If the decks were ripped up, she (the ship) would fill with water.” Cross-examined: “Some of the rigging had gone, and the ship was lurching violently. We thought, of course, then, that the mast would go, or, if it did not go, that it would rip up the decks.”

The second mate says,—“The mast kept lurching: the rigging was ultimately cut away, and then the mast went over the side to starboard.” Question: “Why was the port-rigging cut away?” Answer: “To let the mast go.” Question: “Why did you want the mast to go?” Answer: “Because it would have torn the ship’s deck; it would have opened her up.” Cross-examined, he says,—“If it had broken off, it would have been a different thing altogether. We were afraid of its ripping up the decks . . . I can’t say if the mast would have gone whether we had cut the port-rigging or not. She might have got steadier afterwards. I decline to speculate on what might have occurred. I know that, if the mast had not gone, the ship would have opened out.”

The expert called first for the defendant said that, under the circumstances described in the evidence for the plaintiffs, he would have described the mast as a wreck,—a gone mast. On cross-examination he said that, “if the mast had been lunched out of the ship, that would have been an extremely dangerous thing for the vessel.”

The other experts give evidence much to the same effect, —one saying that “it (the mast) was an impediment to the adventure, and one that it was desirable in the interests of 581] all to get rid of.” *Another, on cross-examination, said that, if the weather had moderated, it might have been possible to have saved the mast, but difficult.

The substance of the evidence appears to us to be,—first, that, if the storm had continued, of which there was great probability, the mast would not have broken, but would have gone wholly overboard, tearing up the ship, and that in all probability the whole would have been lost,—secondly, that the mast might possibly have been saved if the weather had moderated quickly, but that this was very improbable,—thirdly, that the mast was cut away, not as a

mere incumbrance, like a mast overboard and attached to the ship by rigging, but for the purpose of preventing its tearing up the ship and sacrificing the adventure.

The learned judge concluded his summing-up as follows : " You must judge for yourselves, having regard to all the circumstances, the state of the weather, the state of the sea, the rigging gone, and all the circumstances as proved by the witnesses, and there is no evidence to contradict it. Are you of opinion that that mast was virtually a wreck and valueless and gone at the time it went over ? "

The jury found that the mast was a wreck ; and, in answer to a further question by the learned judge, " Do you find whether it was hopelessly lost ? " " Yes. "

The rule before us was obtained on the ground of misdirection, and that the verdict was against the weight of evidence.

The misdirection complained of was, that the judge did not ask the jury, as was done by Cleasby, B., in the case of *Corry v. Coulthard* (1), " whether, if the weather had moderated, the mast could possibly have been saved. "

During the argument, another question occurred to us as having an important bearing upon this case, which was this, whether at the time the mast was cut away, the purpose for which it was cut away was to save the adventure by preventing the mast tearing up the ship, to which the evidence very strongly pointed, or whether it was cut away as wreck, as a mere incumbrance, or lumber.

This question was very much discussed by the Court of Appeal in *Corry v. Coulthard* (1), to which we shall presently refer.

* We are of opinion that both the questions just al- [582 luded to should have been asked of the jury, that, although the learned judge does say to them, that, if the mast had not been cut away, it would have been very dangerous for the vessel, and that there was common danger to the ship and to the cargo, he does not put these as questions to the jury, but leaves to them only the question of whether the mast was virtually a wreck, and gone. He says, " As to putting to you whether, if the weather had moderated, it might have been saved in a storm amounting to a hurricane, or at all events a heavy gale, and the ship in the trough of the sea, and the weather not showing any signs of improvement, to ask you whether, if the weather had moderated, the mast might have been saved, seems somewhat out of

(1) Not reported.

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place in this case:" and he then puts the question which he repeats at the close of his summing-up.

We are further of opinion that, assuming the questions which we have stated to have been put to the jury, and the jury had found for the defendants, that finding would have been wrong and against the weight of evidence.

In our judgment, the beneficial objects of the doctrine and law of general average would be frittered away, if, where a sacrifice is made, as seems obviously the case here, to save the whole adventure, the sharing the burden of such sacrifice could be made to depend upon nice questions of probability afterwards discussed, as to whether the thing might or might not have been saved.

In ordinary questions of general average, it is presupposed that greater danger exists to the ship and cargo, and in those cases the probability is that the thing sacrificed would have gone with the whole venture, and therefore it would be the sacrifice of a probably valueless thing. Here, if the mast had gone, the ship would probably have gone with it. The ship was probably saved by the sacrifice of the mast. The evidence appears all one way on this point. The case differs in our judgment from those of cutting away wreck, as hypothetically put by Willes, J., in the case of *Johnson v. Chapman* (*), where he supposes a case of part of a mast going overboard, with spars and sails attached to it and hanging by a stay, battering and adding to the danger of a vessel. There the wreck is real, not anticipatory; and, as Willes, J., observes, "You cannot keep it; 583] there is no intentional sacrifice *in cutting it away." Here, the mast was sound and entire as a mast; it was in its usual place, though lurching from the rigging being gone on one side.

It would defeat the main utility of general average, if, at a moment of emergency, the captain's mind were to hesitate as to saving the adventure, through fear of casting a burden on his owners. What was the pressing necessity here at the time of the act? The prevention of the ship being torn up and lost. "Wreck" is hardly an accurate term for contingent wreck. The making the potential the same as the actual, we cannot help thinking, will much embarrass the law on this subject; and the judgment of experts as to probabilities after the event is a very dangerous criterion for a jury to be guided by. The case of *Corry v. Coulthard* (*)

(*) 19 C. B. (N.S.), 563, at p. 582; 35 upon the 21st of December, 1876, and in L. J. (C.P.), 23, at p. 28. the Court of Appeal upon the 17th of

(*) Not reported. *Corry v. Coulthard* January, 1877.
was heard in the Exchequer Division

is almost identical in facts with this case; indeed, in our judgment, it is identical in so far as the legal question is concerned. That case is not reported: but, by consent of counsel on both sides in this case, we have been furnished with the shorthand writer's notes of it. The Court of Appeal, consisting of the Lord Chief Justice of England, Sir B. Brett, and Sir R. Baggallay, gave no formal judgment; but their observations in the case on the motion by way of appeal from the Exchequer Division, are all one way; and wholly in point as to the present case. There, the mast (an iron one) becoming loose, the captain feared (though it turned out afterwards without cause) that it would go through the bottom of the ship, and he cut it away. The same contention was put forward there as here; but the jury found for the plaintiff, i.e., in favor of general average, Baron Cleasby asking them whether, if the weather had moderated, the mast could possibly have been saved. But the observations of the court go much further than on the mere question whether the direction of the judge was right. The Lord Chief Justice says: "It is not necessary that the judgment of the master should be borne out by the facts when they come to be examined into: it is enough if he exercise his judgment under all the circumstances. . . . He must exercise his judgment. He cuts away the mast, not because *of its value as a mast, but because he thinks [584 its condition is likely to be destructive of the vessel. . . . If the danger is that the mast will perish at the same time that it causes the perishing of the ship, and it is cut away for the purpose of preventing peril to the ship and its own destruction, is not that general average? . . . Whatever be the condition of the mast, it was a source of danger to the ship." The Lord Chief Justice says much more to the same effect.

Sir Baliol Brett says: "You do not mean to say it was so valueless that a man, in a calm, would have thrown it overboard: it was worth money. . . . Wreck means rubbish, I suppose. . . . If it is done for the benefit of the ship and cargo, then it is general average."

In the present case it appears to us the evidence is greatly preponderating, that the mast was cut away for the benefit of the ship, cargo, and crew, that it was not actual wreck, and was not cut away as such.

Mr. Phillips, a high authority on this subject, says, § 1271,—“If the thing abandoned is itself so exposed to destruction that it cannot possibly be retrieved and saved, and its abandonment cannot possibly contribute to the safety of

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the crew and ship, cargo, or freight, there may be ground of objection to contribution; but, in case of such objection, the construction will be very liberal in favor of contribution."

Being of opinion that the question of the mast being saved was put to the jury as one of probability, and not of possibility; that no question was left to them as to the purpose for which the mast was cut away; and that contingent wreck was treated by the judge as though it were actual wreck,—we think there should be a new trial. We also think that, although the learned judge is not dissatisfied with the verdict, yet that the verdict was against the weight of evidence, regarding the evidence from the point of view we have regarded it in this judgment.

Rule absolute for a new trial(¹).

Solicitors for plaintiffs: *Lewis & Watson*.

Solicitors for defendants: *Hollams, Son & Coward*.

(¹) Reversed on appeal, Nov. 23, next case.

[2 Common Pleas Division, 585.]

Nov. 23, 1877.

[IN THE COURT OF APPEAL.]

585] *SHEPHERD and Others v. KOTTGEN and Others(¹).

Shipping—General Average—Part of Vessel injured by Perils of the Seas and dangerous to whole Adventure—Voluntary destruction of useless Part of Adventure—“Sacrifice.”

Whilst on a voyage to H. a vessel met with a storm, which caused parts of the rigging to give way; the mainmast in consequence began to lurch violently, and was cut away by the captain's orders; if the mast had not been cut away, it would, in all probability, have fallen overboard in a few minutes, and in so doing might have torn up the decks and caused the vessel to founder; the vessel having outlived the storm, was repaired at a port of refuge, and proceeded on her voyage to H., where she delivered her cargo. An action having been brought by the owners of the vessel against the owners of the cargo for a general average contribution for the loss of the mast, at the trial the judge asked the jury, whether at the time when the mast was cut away it was virtually a wreck and valueless; but he did not ask them to find whether if the weather had moderated the mast could possibly have been saved, nor did he ask them to find whether the mast was cut away to save the adventure, or as a mere incumbrance:

Held, reversing the decision of the Common Pleas Division, a proper direction.

THIS was an appeal by the defendants against a decision of the Common Pleas Division making absolute a rule for a new trial. The case is reported *ante*, p. 578, and the facts are stated in the judgment delivered by Grove, J., but owing

(¹) Reversing preceding case.

to the view taken in the Court of Appeal as to evidence relating to the condition of the mast at the time when it was cut away, the following particulars were added:—

The first of the four experts called for the defendants stated that in his judgment it was impossible to repair the rigging so as to secure the mast, and that by cutting away the mast the captain accelerated its going overboard, “perhaps to the amount of a minute or two, not longer than that.” The second stated that it was impossible to save the mast after the rigging was gone; the third stated that with the rigging gone the mast was “as good as a wreck;” that it was impossible to save it; that if the weather did not moderate it might be looked upon as likely to go over at any moment, and that there was no reasonable prospect of the weather moderating so as to enable the crew to repair the rigging; the fourth stated that there was no chance of saving the mast.

*Nov. 22, 23. *C. P. Butt, Q.C., and J. C. Mathew*, [586 for the defendants: It must be admitted that if, at the moment of cutting away the mast, there was any reasonable probability of saving it as part of the adventure, the plaintiffs would be entitled to contribution; but a claim to general average always assumes that the thing destroyed is capable of being saved; and here it is found by the jury that at the time of cutting away the mast it was a “wreck,” and “hopelessly lost”; therefore as it was valueless, nothing was sacrificed, and the defendants are not bound to contribute. It is plain from the evidence that in all human probability the mast would have fallen overboard before any abatement of the gale could take place, and the distinction between probability and possibility cannot be relied upon. Suppose that a bale catches fire in the hold of a vessel laden with cotton; if it is left to burn the fire may and probably will extend to the rest of the cargo and even to the vessel, and the whole adventure may perish; but if the burning bale is thrown overboard to prevent further mischief the owner of it is not entitled to contribution, for it has ceased to be of value to him. Hardly any authority is to be found as to this question amongst the decisions of the English courts; but a reference to text-books shows that, if at the moment when a thing is cut or cast away it must certainly perish, its intentional destruction by the act of the master is not the subject of general average: *Benecke on Marine Insurance*, ch. v, pp. 183, 184, 243⁽¹⁾; *Parsons on Marine Insurance*, ch. 14, page 608,

⁽¹⁾ But see *Arnould on Marine Insurance*, part 3, ch. 4, p. 816 (5th ed.); *Mac-*lachlan on Shipping, ch. 14, page 608, (2d ed.)

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ance, vol. 2, ch. v, p. 212, citing *Crockett v. Dodge* ('); *Slater v. Hayward R. Co.* ('); *Lee v. Grinnell* ('). The mast of the plaintiffs' vessel was as much lost as if it had gone overboard and were hanging by a stay; and according to the view of the Court of Common Pleas in *Johnson v. Chapman* ('), cited in the judgment of the Common Pleas Division (*ante*, p. 582), no claim to general average can arise; and it is contended for the defendants that where a thing, which is cut away because it endangers the safety of the vessel, is in such a state that it must certainly perish, its [587] destruction does not give *rise to a general average claim, although the rest of the adventure is saved. In the present case the captain ordered the mast to be cut away in the performance of his duty towards the shipowners; he was not then acting as agent on behalf of all parties interested in the adventure.

A. Cohen, Q.C., and *J. A. McLeod* (*H. Sutton* with them), for the plaintiffs: According to the principles of general average, as they are understood in modern times, one of its chief objects is that in the hour of peril the master shall not be embarrassed by the consideration, what persons will be injured by the sacrifice of a particular portion of the adventure; he is to act as the agent of all persons interested in the vessel and her cargo; and therefore if he intentionally abandon or destroy anything for the benefit of the adventure, the owner of it will be entitled to contribution. Some views formerly held as to the nature of general average may not be quite consistent with this doctrine advanced on behalf of the plaintiffs, but they must be considered as now discarded. It is sufficient if, at the moment when the loss happens, the thing sacrificed has some value, and it is immaterial that it may soon become of no value. *Johnson v. Chapman* (') affords a striking instance of the extent to which the right to general average has been carried; there a deck load of timber, by breaking adrift, obstructed the working of the pumps; a portion of it having been jettisoned, the owner was held to be entitled to contribution; and the ground of the decision was that the common peril, namely, the storm, was the cause of the deck load becoming dangerous to the whole adventure. In the case suggested by the defendants' counsel, of a bale of cotton catching fire on board a ship, the danger arises from a special accident happening to the bale itself, and apart from the bale there

(1) 8 Fair., 190.

(2) 26 Conn., 128.

(3) 5 Duer, 400.

(4) 19 C. B. (N.S.), 563, at p. 562; 35 L. J. (C.P.), 23, at p. 28.

(5) 19 C. B. (N.S.), 563; 35 L. J. (C.P.), 23.

is no peril common to the whole adventure. The principle of *Johnson v. Chapman* (') applies here; for it was the gale which, by loosening the rigging, rendered it extremely probable that the mast, if not cut away, would cause the vessel to founder; if the storm had not been so severe, the rigging might have been forthwith repaired by the crew, and the mast might have been secured without injury. The plaintiffs contend that when a thing is voluntarily destroyed or abandoned, *not by reason of an in- [588 herent or peculiar defect, but owing to a common peril, the right to contribution arises; and if this proposition be correct, the judge at the trial ought to have directed a verdict for the plaintiffs. *Corry v. Coulthard* (") is directly in point for them. The right to general average must always receive a liberal construction: Phillips on Marine Insurance, vol. ii, par. 1271 (cited *ante*, p. 584).

[BRETT, L.J.: The passage cited from Phillips has reference to the question, What is an imminent peril? It does not seem to me to apply to the present case, where the matter in dispute is the value of the thing destroyed at the moment of destruction.]

It is admitted on behalf of the plaintiffs, that no claim to contribution would arise if the mast had been so rotten that it would have been cut away in fine weather; but, upon the facts, what rendered the mast worthless was the storm, which was the common peril of the whole adventure. It is for the captain to determine what is best to be done, and if he acts *bona fide*, the exercise of his discretion ought not to be interfered with.

J. C. Mathew replied.

BRAMWELL, L.J.: I think that this appeal must be allowed. The right question was left to the jury, and the verdict was supported by sufficient evidence, and when the judgment of the Common Pleas Division is examined, it will be found that there is no real difference as to the law between *Grove, J.*, and *Lopes, J.*, upon the one hand, and *Manisty, J.*, upon the other; but that they misapprehended the effect of what he stated to the jury. They seem to have thought that he omitted to ask the jury whether it was possible to save the mast. I think he did ask that question, and that it was answered in the negative, for the jury said that the mast was "hopelessly lost." Upon the evidence, it is plain that the mast was in the course of destruction, and the only matter to be considered by those on board was in what manner its destruction should be completed. Lord Justice

(') 19 C. B. (N.S.) 563; 35 L. J. (C.P.), 28.

(") See *ante*, pp. 583, 584.

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human foresight could take account, of the storm abating, so as to enable the mast to be secured, and the mast was lost whether it was or was not cut away. Under these circumstances it seems to me that there was no sacrifice of the mast, that the act relied upon caused no loss to the owners, and therefore that no claim for general average can be sustained.

I may add that what distinguishes this case from *Corry v. Coulthard* ⁽¹⁾ is that there the jury found that it was possible to save the mast; it follows that in *Corry v. Coulthard* ⁽¹⁾ the mast was of some value, and the facts of that case did not fall within the proposition which I have endeavored to lay down.

COTTON, L.J.: I am of opinion that there should be no new trial, and that this appeal must succeed. As I understand the finding of the jury, the mast, as distinguished from the vessel, was "hopelessly lost" at the time when the act relied upon as giving a claim for contribution took place. Now "hopelessly lost" must mean "impossible to be saved." In the language of everyday life a thing is impossible when, according to the ordinary course of human events, no expectation can be entertained that it will happen: and I think, upon the evidence, it is plain that no hope could be entertained of preserving the mast, for in all human probability, whether the vessel were saved or not, the mast would in a few moments have gone overboard. In fact, one of the experts says that what was done hastened the fall of the mast by one or two minutes, and no more. I do not think that this state of facts justifies a claim for contribution. The principle of general average may be thus stated; where part of a common adventure, by which I mean a ship and her cargo, is voluntarily abandoned or destroyed for the purpose of saving the whole, when the remainder, not abandoned or destroyed, is saved, it is equitable 592] *that all those whose property is saved should contribute towards the loss of their co-adventurer, whose property has been abandoned or destroyed for the common benefit. But the property abandoned or destroyed must in all respects be considered in the same light as if it had been saved, and its value must be estimated accordingly; and it follows that where the thing said to have been voluntarily abandoned or destroyed is in such a state, by reason of a peril peculiar to itself, that if the act of supposed sacrifice had not been done, it would have very shortly been destroyed, without the rest of the common adventure being lost, the act of slightly hastening the moment of loss is not

⁽¹⁾ See *ante*, pp. 583, 584.

an act of sacrifice which enables the owner of the thing to claim contribution; there is no act of sacrifice if within a short time the thing would have been lost by a peril peculiar to itself, and independent of the common peril to which the whole adventure is exposed.

Judgment reversed.

Solicitors for plaintiffs: *Lewis & Watson.*

Solicitors for defendants: *Hollams, Son & Coward.*

C A S E S
DETERMINED BY THE
EXCHEQUER DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE EXCHEQUER DIVISION,
X L V I C T O R I A.

[2 Exchequer Division, 336.]

April 26, 1877.

336] *WILSON and Another v. FINCH HATTON.

Landlord and Tenant—Lease of a Furnished House—Implied Condition of Fitness for Occupation.

In an agreement to let a furnished house there is an implied condition that the house shall be fit for occupation at the time at which the tenancy is to begin, and if the condition is not fulfilled the lessee is entitled thereupon to rescind the contract.

The defendant agreed to rent the plaintiffs' furnished house for three months from the 7th of May, but having at the beginning of the intended tenancy discovered that the house was, owing to defective drainage, unfit for habitation, refused to occupy. The plaintiffs repaired the drains, and on the 26th of May tendered the house in a wholesome condition to the defendant, who refused to occupy or to pay any rent. The plaintiffs having sued for the rent and for use and occupation :

Held, that the state of the house at the beginning of the intended tenancy entitled the defendant to rescind the contract, and that he was not liable for the rent or for use and occupation.

Smith v. Marrable (11 M. & W., 5 ; 12 L. J. (Ex.), 223) approved.

THIS was an action to recover the sum of 450 guineas, being the rent of a furnished house in Wilton Crescent, under an agreement, by which the defendant agreed to hire the
337] plaintiffs' house from *the 7th of May to the 31st of

July, 1875. The plaintiffs also claimed the same sum for use and occupation of the house.

The statement of defence alleged that the agreement was made upon the implied condition that the house should be fit for habitation, and that owing to the bad state of the drains, it was not fit on the 7th of May. The occupation was also denied.

At the trial before Quain, J., in Middlesex, at the Hilary Sittings, 1876, it appeared that the defendant, acting for the Dowager Countess of Winchelsea, agreed to take the house from the plaintiffs, who as trustees of a Mrs. Hale, were owners thereof. The agreement contained provisions to the effect that the rent should be paid in two equal instalments, one on the first day and the other on the last day of the tenancy; that the plaintiffs should keep the premises in good substantial repair, and that the defendant should deliver them up at the end of the tenancy in as good a state as he had received them, reasonable wear excepted.

Before the agreement was signed the defendant wrote to the plaintiffs' agent to make inquiries as to the state of the drains. The agent wrote in reply that "Mrs. Hale believes the drainage to be in perfect order."

On Saturday, the 8th May, the tenant's coachman brought her horses to the stable, and she herself arrived from the country with her servants and personal luggage; but as she perceived an unpleasant smell in the house she declined to occupy the house, and had her horses taken out of the stable. A builder examined the house at the request of the tenant on the following Monday, and she then wrote to the plaintiffs' agent to say that she would not occupy the house.

The inspector of nuisances for the district also visited the house on the Monday, and inspected the premises, when he discovered that the drains, which were old brick drains, were much out of repair; that there was a cesspool under the pantry, and a considerable amount of stagnant sewage matter under the basement floor. The defendant thereupon gave notice to the plaintiffs that he should decline to occupy the house at all. The sanitary authorities gave the plaintiffs formal notice to repair the drains, and these repairs having been effected, the house was tendered to the defendant in a wholesome condition on the 26th of May. He, however, declined to enter and occupy, or to pay any rent.

*Quain, J., told the jury that there was an implied [338

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condition in an agreement for the letting of a furnished house, that it should be fit for occupation, and asked them whether this house was so fit on the 7th of May. The jury answered this question in the negative, and the learned judge entered the verdict for the defendant, leave being reserved to the plaintiffs to move to set aside the verdict and enter it for them, on the ground that there was no implied term or condition that the premises were to be fit for habitation, and further that the premises being put in such a condition by the 26th of May, the plaintiffs were entitled to the rent.

April 26th (*). *J. Brown, Q.C., and Trevelyan*, moved accordingly: In the absence of misrepresentation or fraud the landlord was not bound to inform the tenant of that which he could by inspection discover for himself. The intending lessee of a house does not trust to the lessor's judgment, but inspects it himself, or by his agent. The condition of the premises, therefore, is as much within his knowledge as within that of the lessor, and there is, therefore, no implied covenant such as the defendant wishes to introduce here: *Francis v. Cockrell* (*), per Kelly, C.B. The case of hiring a house resembles that of a buyer who inspects goods, and buys them on his own judgment, in which case there is no implied warranty, according to the first rule laid down in *Jones v. Just* (*). A tenant examines the house and can satisfy himself as to its condition, and make such stipulations as seem necessary: *Keates v. Earl Cadogan* (*). *Smith v. Marrable* (*) will be relied on by the defendant, but that case may be distinguished on the ground that the defect was in the furniture, and not in the house; and also, because the agreement in that case did not contain the express provisions that are found here. *Smith v. Marrable* (*), however, has been so much doubted even if not overruled, that it cannot now be considered good law. Parke, B., who was a party to the decision, questioned its 339] *authority in giving judgment in *Sutton v. Temple* (*), and he also stated in *Hart v. Windsor* (*) that the cases on which the decision in *Smith v. Marrable* (*) proceeded could not be supported, and were not law. This view is confirmed by the remarks of Coltman, J., in *Surplice v. Farns-*

(*) The motion was originally made on the 10th of May, 1875; but the court, which then consisted of two judges only, desired that the case should be argued again before three judges.

(*) Law Rep., 5 Q. B., 501, at p. 506.

(*) Law Rep., 3 Q. B., 197, at p. 202.

(*) 10 C. B., 591; 20 L. J. (C. P.), 76.

(*) 11 M. & W., 5; 12 L. J. (Ex.), 228.

(*) 12 M. & W., 52; 13 L. J. (Ex.), 17.

(*) 12 M. & W., 68; 13 L. J. (Ex.),

worth ('); and the observations of Erle, J., in *Heard v. Camplin* ('), show that he did not consider *Smith v. Marra-ble* (') to be good law. It was clearly stated by the court in *Searle v. Laverick* (') that in the ordinary case of lessor and lessee there is no implied covenant that the building shall be fit for the purpose for which it is let. The American cases confirm the authority of the decisions in *Sutton v. Temple* (') and *Hart v. Windsor* ('), and show that the defendant is, at all events, bound to pay the rent claimed, and to bring a cross action to recover the damages, if any, caused by the plaintiffs' default: *Westlake v. De Graw* ('); *Dutton v. Gerrish* ('); *Foster v. Peyser* ('); *McGlashan v. Tallmadge* ('). The Irish case of *Murray v. Mace* (') is to the same effect. Even if it could be said that in some cases there might be an implied covenant, that contention is excluded here by the fact that there is in this agreement an express covenant by the plaintiffs to keep the premises in repair, so that all implied covenants are excluded, *Line v. Stephenson* ('): for by the terms of such a covenant the plaintiffs would be bound to put them into repair: *Payne v. Haine* ('). Moreover, if there was an implied condition such as the defendant contends for, it is not more than a covenant, and it is not a condition precedent, so that it does not go to the whole consideration for the agreement, and does not give the defendant a right to rescind the contract, but only to sue for damages, or to recover the expenses which have been caused by the breach of the covenant, according to the well known rule in *Pordage v. Cole* (').

A. L. Smith (with him *McIntyre*, Q.C.), for the [340 defendant: The rule as to warranties which are implied by law is well expressed in *Redhead v. Midland Ry. Co.* (') by M. Smith, J., who says that they are founded on the presumed intention of the parties to the contract. The cases cited for the plaintiffs may be distinguished on the broad ground that they relate to demises of real property, and therefore they do not overrule *Smith v. Marra-ble* ('). The tenant did not get what she had bargained for, viz., a habitable house for the whole term. [He was then stopped.]

(1) 8 Scott, N. R., 307, at p. 316; 13 L. J. (C.P.), 215.

(2) 15 L. T. (O.S.), 437.

(3) 11 M. & W., 5; 12 L. J. (Ex.), 223.

(4) Law Rep., 9 Q. B., 122, at p. 131.

(5) 12 M. & W., 52; 13 L. J. (Ex.), 17.

(6) 12 M. & W., 68; 13 L. J. (Ex.), 129.

(7) 25 Wendell, 669.

(8) 63 Massachusetts, 89.

(9) 63 Massachusetts, 243.

(10) 37 Barbour, 313.

(11) Ir. Rep., 8 C. L., 396.

(12) 4 Bing. N. C., 678; 7 L. J. (C.P.), 263.

(13) 16 M. & W., 541; 16 L. J. (Ex.), 180.

(14) 1 Wms. Saund., p. 320, c.

(15) Law Rep., 4 Q. B., 379, at p. 392.

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houses are, and those in which real property is, demised, differ greatly. Where real property, such as a house and lands, is taken by a tenant in a state so dilapidated as to require a large expenditure of money to put it into repair, to hold that the contract contained an implied condition that the lessor should put such premises into repair, would be clearly contrary to the intention of the parties. When, however, a person takes a furnished house for a brief period of time it is clear that he expects to find it reasonably fit for occupation from the very day on which he intends to enter, and the lessor is well aware that this is the view entertained by the tenant. If indeed this were not so, what limit could be imposed to the time during which the tenant might be kept out of possession, and how long would he have to wait while the value of his tenancy was daily diminishing? It is then said that the tenant in this case could have gone to an hotel, and could have recovered the amount of the expenses there incurred from the plaintiffs; but I am of opinion that she is not to be forced to do this, and to be compelled to sue the plaintiffs as well as to suffer the loss of that for which she had contracted, and for which she would, according to this contention, be paying rent.

343] *With regard to the exclusion of all implied conditions by the express agreement to keep in repair, I think that as there is no express contract here to put the premises into good repair, that argument is not well founded, and that the plaintiffs cannot be entitled to recover on that ground. I may say that, although I was quite prepared to hold on the ground of reason and common sense, that the defendant was not liable in this action, still I listened carefully to the facts of each case cited, in order that I might notice whether any of them were cases of furnished houses; but none of those cited did relate to furnished houses, with the exception of the case of *Smith v. Marrable* (¹), which is a decision in favor of the defendant, and directly opposed to the contention of the plaintiffs. Now, I am prepared to hold that the law as laid down in that case is good and sound law, and I may add that, although some discussion may have taken place about that case, and although some doubts may have been thrown on the law as there propounded by judges of learning and eminence, still, I have no hesitation in holding that it is an implied condition in the letting of a furnished house, that it shall be reasonably fit for habitation. I am therefore of opinion that, both on the authority of *Smith v. Marrable* (¹), and on the general

(¹) 11 M. & W., 5; 12 L. J. (Ex.), 223.

principles of law, there is an implied condition that a furnished house shall be in a good and tenantable condition, and reasonably fit for human occupation from the very day on which the tenancy is dated to begin, and that where such a house is in such a condition that there is either great discomfort or danger to health in entering and dwelling in it, then the intending tenant is entitled to repudiate the contract altogether. Consequently, this motion must be refused, and the judgment of the court must be for the defendant.

POLLOCK, B.: If this were the case of an agreement for the letting of real property, the well-established rules of law would apply, and they would force us to hold that the tenant could not succeed in this case; but although in the case of a furnished house many of the incidents which attach to a demise of realty may be applicable, inasmuch as the rent does in a sense issue out of the realty, still the rent paid for a furnished house such as this *is not merely rent [344 for the use of the realty, but a sum paid for the accommodation afforded by the use of the house, with all its appurtenances and contents, during the particular period of three months for which it is taken.

This is a contract for the occupation of a house and furniture for a named three months. Looking at the subject-matter, it is clear that such a contract does not come within the rules laid down in the judgment in *Jones v. Just*(¹); but still some of the incidents of this contract are analogous to those of the cases of the supply of chattels there discussed, and it may therefore be observed that the defect was in this case latent, and that the defendant may be held to have relied with reason on the assurance of the lessors as to the condition of the house.

Apart, however, from authority, it is, I think, clear, that the plaintiffs have not supplied to the tenant that which both parties intended they should supply. The tenant then has done what she was entitled to do, as she repudiated the contract without delay, and she is not to be compelled to enter on the tenancy and then to sue the plaintiffs in a cross action for damages.

The cases which refer to real property do not govern this contract; but *Smith v. Marrable*(²) furnishes us with an authority for our decision. In my opinion, that case has been hardly treated, for the judgment has never been overruled, and is now good law. It is true that Parke, B., did rest his own judgment in banc in part on the authorities

(¹) Law Rep., 3 Q. B., at p. 202.

(²) 11 M. & W., 5; 12 L. J. (Ex.), 223.

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which relate to demises of real property, and therefore he did in the more recent case of *Hart v. Windsor* (') retract so much of his judgment as was founded on those cases; but the rest of the judgment remains untouched, and the real principle of the case is unassailed, and I think unassailable; for, as is said in the judgment of Lord Abinger('): "A man who lets a ready-furnished house, surely does so under the implied condition or obligation that the house is in a fit state to be inhabited." It has been assumed, too, that it was the furniture and not the house that was infested; but it would seem that that was not the case, and that the animals were found in both.

345] *It was next argued that there could be no implied condition or warranty, because there was an express proviso that the premises should be kept in good repair. The answer to that contention is, that the immediate cause of the evil complained of was the sewage matter which had collected under the floor, and not the structural want of repair which led to the leakage, whence the bad smells arose.

Then it was said that this condition is not a condition precedent, but a covenant, and that the case was thus brought within the well known doctrine contained in *Boone v. Eyre* ('), and, therefore, as the breach does not go to the whole consideration, it does not entitle the tenant to reject the tenancy *in toto*, but only gives her a remedy on the covenant, and entitles her on entry to bring an action for damages for the delay. The answer to this argument is, I think, the same as the answer to the first part of the plaintiffs' contention, and as the Lord Chief Baron has so fully dealt with that, I do not think it necessary to go over the ground again; for I think it is clear that the tenant was entitled to reject the contract at once, and was not bound to wait until the premises were put into proper repair. I therefore agree that the judgment of the court must be for the defendant.

HUDDLESTON, B.: I am of the same opinion. There was here an agreement made, terms settled, and an entry under that agreement. On first entering the lessee found a state of affairs which the witnesses at the trial described as dangerous to health, and the jury found that the premises were unfit for occupation.

I think it is clear that there is in such a contract as this an implied condition that the furnished house agreed to be let and taken shall be reasonably and decently fit for occu-

(') 12 M. & W., 68; 18 L. J. (Ex.), 129.

(') 11 M. & W., at p. 9.

(') 1 H. BL., 273, n.

pation. For this there is the good authority of *Smith v. Marrable* (*), where Lord Abinger says, with excellent sense, "no authorities are wanted, and the case is one which common sense enables us to decide."

Now this doctrine has never been overruled, and Lord Abinger adhered to it in *Sutton v. Temple* (*), and in *Hart v. Windsor* (*). *In the American case of *Dutton v. [346 Gerrish* (*), Shaw, J., says that in the case of furnished rooms in a lodging house, let for a particular season, a warranty may be implied that they are suitably fitted for such use. *Searle v. Laverick* (*) was decided on another point, and *Smith v. Marrable* (*) was consequently not cited; but in the *nisi prius* case of *Campbell v. Wenlock* (*) it was discussed and approved. I am of opinion, therefore, that we are justified on principle, authority, and justice in holding that there is a condition in a lease of a furnished house that it is fit for living in, and that the defendant in this case was justified in repudiating this house and in refusing to pay any rent.

*Motion refused and judgment for
the defendant.*

Solicitors for plaintiffs: *Combe & Wainwright.*

Solicitors for defendant: *Parker & Burne.*

(*) 11 M. & W., 5; 12 L. J. (Ex.), 223.

(*) 63 Massachusetts, 89, at p. 94.

(*) 12 M. & W., 52; 13 L. J. (Ex.), 17.

(*) Law Rep., 9 Q. B., 122.

(*) 12 M. & W., 68; 13 L. J. (Ex.) 129.

(*) 4 F. & F., 716.

[2 Exchequer Division, 346.]

May 5, 1877.

ORAM V. BREAREY.

*Prohibition—Want of Jurisdiction in Inferior Court—Application by Defendant
—Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx).*

SECT. 7 of the Salford Hundred Court of Record Act, 1868, enacts that "No defendant shall be permitted to object to the jurisdiction of the court otherwise than by special plea, and if the want of jurisdiction be not so pleaded the court shall have jurisdiction for all purposes":

Held, that the section did not oust the jurisdiction of the superior courts to restrain by prohibition, and that a defendant who was sued in the Salford court, for a matter over which that court had no jurisdiction, might himself apply to a superior court for a writ of prohibition.

Jacobs v. Brett (Law Rep., 20 Eq., 1; 13 Eng. Rep., 566) approved.

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Hand v. Hall.

[2 Exchequer Division, 355.]

June 15, 1877.

[IN THE COURT OF APPEAL.]

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*HAND V. HALL (').

Landlord and Tenant—Agreement, Construction of—Demise, Actual or Contingent—Option to Lessee to continue holding for Three Years beyond a Demise for a Year—Statute of Frauds (29 Car. 2, c. 3), ss. 1, 2; 8 & 9 Vict. c. 106, s. 3.

The plaintiff and defendant entered into the following agreement not under seal: "Jan 26. Hand agrees to let, and Hall agrees to take, the large room, &c., from 14th February next until the following Midsummer twelve months, and with right at end of that term for the tenant, by a month's previous notice, to remain on for three years and a half more."

Held, reversing the judgment of the Exchequer Division, that the agreement was divisible, and contained an actual demise for a term less than three years, with a superadded stipulation that the defendant at his option should have a renewal of the tenancy, and that, as to the actual demise, it need not be under seal pursuant to 8 & 9 Vict. c. 106, s. 3.

APPEAL by the plaintiff from the judgment of the Exchequer Division in favor of the defendant: 20 Eng. R., 568.

Powell, Q.C., and *Arthur Underhill*, for the plaintiff: 356] The *question is, whether the document is a lease for more than three years; the Exchequer Division held, in effect, that it is, and not being under seal, is invalid. That decision is erroneous. The document contains two distinct agreements; the first part is an actual demise from the 14th of February till the following Midsummer twelve months; the latter part is a contract that, at the option of the tenant, on a notice given by him, he may remain in possession; it is, in effect, a contract for the renewal of the term. *Non constat*, that the defendant will ever exercise his option to have a renewal. In *Rollason v. Leon* (') the defendants, by a contract dated January, agreed to let, and the plaintiffs to take, a mill and premises for the period of three years from Lady Day then next, a lease for the same to be executed as soon as possible, subject to the permission of the landlord; and the defendants also agreed to let, and the plaintiff to take, the mill from the date of the agreement up to Lady day then next, Channell, B., says, "The parties here intended to provide for two periods of time—one to Lady Day, the other from three years from that time—at all events, there was an actual demise till Lady Day." In the present case there is an actual demise until Midsummer, and then a contract for the renewal of the term; and although that part of the agreement may be void, the first part, which creates

(') Reversing 20 Eng. Rep., 568.

(') 7 H. & N., 73; 31 L. J. (Ex.), 96.

an actual demise, is perfectly good. It is true that there has been no occupation; the plaintiff, however, seeks to recover the rent not by reason of occupation, but under the demise. The document shows that the intention of the parties was that one should let, and the other take, the premises; the words create a present demise, and the plaintiff is entitled to recover the rent: *Fergusson v. Cornish* ⁽¹⁾.

Francis, for the defendant: The question is, what right does the memorandum of agreement give the defendant? It confers on him a right to continue tenant for a longer period than three years. If so, under 29 Car. 2, c. 3, ss. 1, 2, and 8 & 9 Vict. c. 106, s. 3, the agreement, not being by deed, is void. The term is not an absolute present demise. The agreement is dated the 26th of January, and the term is to begin on the 14th of February, and *then, on [357 the tenant giving a notice, he is to continue his holding under the right originally given by this document. He requires no fresh document or title, but he holds on under the same document and title for a period greater than three years. The document, therefore, confers an interest for a longer period than three years, and ought to have been by deed. The agreement cannot be divided into two parts; it is one entire agreement creating one term only. Secondly, there is an implied agreement for title; the plaintiff had no power to grant the lease ⁽²⁾; the defendant has a right, therefore, to rescind the contract.

[LORD CAIRNS, C.: The defendant cannot set up that defence where there is an actual demise; before the Judicature Acts the remedy would have been by action, and now it may be stated by way of counter claim, but that has not been done in this case.]

Powell, Q.C., was not heard in reply.

LORD CAIRNS, C.: The document we have to construe in this case runs thus: "Hand agrees to let, and Hall agrees to take, the large room on the south end of the Exchange, Wolverhampton, from the 14th February next until the following Midsummer twelve months." Stopping there, there can be no doubt that those words are words of present demise, and if the document had contained those words only, the defendant would have become tenant from the 14th of February to the following Midsummer twelve months. The document, however, goes on: "with right at the end of that term for the tenant, by a previous month's notice, to remain on for three years and a half more." By this latter part of

⁽¹⁾ 2 Burr., 1032.

which contained a covenant not to un-

⁽²⁾ The plaintiff held under a lease derlet.

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the agreement an option is given to the defendant, and must be exercised by him before it can be said that any interest has passed to him. It is a stipulation that at his option, on a notice given to the plaintiff, he shall not be disturbed for three years and a half. Whereas there is not anything to be done by the tenant in the first part of the agreement to create a demise, in the second part something has to be done by him before that part takes effect, and until that is 358] done it is impossible to tell whether a tenancy *shall come into force or not. I think, therefore, that it is absolutely necessary to divide the contract into two parts. I think the agreement is an actual demise, with a stipulation superadded, that if at his option the tenant gives the landlord a notice of his intention to remain, he shall have a renewal of his tenancy for three years and a half.

With all respect for the judgment of the court below, s. 1 of the Statute of Frauds does not apply, nor has 8 & 9 Vict. c. 106 any application to this case.

With regard to the other point. Here there is an actual demise. If the plaintiff's title is defective, it would not entitle the defendant to rescind the contract. If any objection of that nature exists, it must be set up as a cross claim. The demise cannot be got rid of by simply giving a notice to rescind the contract.

I am, therefore, of opinion that the judgment of the court below should be reversed.

COCKBURN, C.J., and BRETT, L.J., concurred.

Judgment reversed.

Solicitors for plaintiff: *Gregory, Rowcliffes & Rawle*, for Mamby, Wolverhampton.

Solicitors for defendant: *Pickett & Mytton*, for T. W. Hall, Bilston.

See 20 Eng. Rep., 570 note.

[2 Exchequer Division, 359.]

June 21, 1877.

[IN THE COURT OF APPEAL.]

359] *FRANCES HENRIETTA NORMAN V. VILLARS.

Husband and Wife—Status of Wife after Decree Nisi for dissolution of Marriage, and before Decree Absolute.

The status of a married woman is not affected by the pronouncing of a decree *nisi* for the dissolution of the marriage. She continues to be subject to all the disabilities of coverture until the decree is made absolute.

Action for taking goods of the plaintiff. Plea: coverture of plaintiff at the time of the alleged taking and of plea pleaded. Prior to the alleged taking a decree *nisi*

had been pronounced for the dissolution of the plaintiff's marriage, which was made absolute after plea and before the trial :

Held (reversing the judgment of the Exchequer Division), that the plaintiff was still a married woman notwithstanding the decree *nisi*, and that the plea was proved.

Prole v. Soady (Law Rep., 3 Ch., 220) distinguished.

WRIT, dated the 4th of February, 1875.

Declaration, that the defendant broke and entered divers rooms of the plaintiff, and seized and took divers goods of the plaintiff.

Plea, dated March 24th, 1875: that at the time of the committing the alleged grievances in the declaration mentioned, the plaintiff was, and still is, married to and the wife of George Lewis Norman, who is still living.

Issue joined.

The action was brought to recover the value of furniture and other goods of the plaintiff, which had been illegally seized by the defendant on the 6th of January, 1875. The plaintiff was a married woman; but prior to that date proceedings had been taken in the Divorce Court by the plaintiff against her husband; and on the 18th of November, 1874, a decree *nisi* had been pronounced for the dissolution of the marriage. The decree was in the usual form: "That the marriage" between, &c., "be dissolved by reason of the respondent's adultery and cruelty, unless sufficient cause be shown to the court why this decree should not be made absolute within six months from the making thereof." That decree was made absolute on the 25th of May, 1875.

The trial took place before Huddleston, B., at the sittings in *London after Trinity Term, 1875, on a day subsequent to the 25th of May.

The learned judge directed a nonsuit, on the ground that the plaintiff being married when the action was brought the husband ought to have been joined, giving leave to move to enter a verdict for the plaintiff for £25, at which the jury assessed the damages.

On motion in the Exchequer Division, the court (Kelly, C.B., Pollock and Huddleston, BB.) gave judgment for the plaintiff, being of opinion that the case was governed by *Prole v. Soady* (').

The defendant appealed.

Talfourd Salter, Q.C., and *Keogh*, for the defendant: The defendant is entitled to succeed on the plea of coverture. The plaintiff was still a married woman at the date of the writ, for the marriage is not dissolved until the decree has been made absolute. On this point *Hulse v. Hulse* (') is conclusive. It was there held that adultery committed

(') Law Rep., 3 Ch., 220.

(') Law Rep., 2 P. & D., 259.

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by the petitioner during the currency of the decree *nisi* was adultery committed "during the marriage," and entitled the court to refuse to finally dissolve the marriage under 20 & 21 Vict. c. 85, s. 31. The case of *Grant v. Grant* (¹) is to the same effect. There the petitioner having died before the decree *nisi* had been made absolute, the question was raised whether the court had power to vary the marriage settlement under 22 & 23 Vict. c. 61, s. 5, by which section they are empowered to do so only after a *final* decree for dissolution. And the court held that they had no jurisdiction, for one of the parties having died the suit had abated, and therefore the decree could not be made absolute, and that until it was made absolute there was no final decree. In *Ousey v. Ousey* (²) Sir James Hannen expresses the same opinion that the final decision of the court by which the marriage is dissolved is the decree absolute, not the decree *nisi*. It will, however, be urged upon the other side, on the authority of *Prole v. Soady* (³), that, even if the decree *nisi* does not of itself put an end to the marriage, still when once it has been made absolute the dissolution relates back to the date of the decree *nisi*. But though the decree absolute may have a *retrospective effect for some purposes, it is not retrospective in the sense that it alters the status of the wife in the interval, so as to entitle her to sue during that period as a *feme sole*; any more than an order obtained under 20 & 21 Vict. c. 85, s. 21, by a married woman, deserted by her husband, for the protection of her property acquired since desertion is retrospective so as to entitle her to maintain an action commenced before the date of the order for injuries to such property: *Midland Ry. Co. v. Pye* (⁴).

McLeod and Safford, for the plaintiff: The plea of coverture was not proved, for the decree had been made absolute before the trial, and thereupon the dissolution related back to the date of the decree *nisi*, which was prior to that of the commencement of the action. On that point *Prole v. Soady* (⁵) is conclusive. There a married woman being entitled to a fund in court, joined with her husband in assigning the fund by way of mortgage as security for a loan. Soon afterwards a decree *nisi* was pronounced for the dissolution of the marriage, and before it was made absolute, Stuart, V.C., on the application of the assignee ordered payment of his debt out of the fund in court. Subse-

(¹) 31 L. J. (P. & M.), 174.

(²) Law Rep., 3 Ch., 220.

(³) Law Rep., 1 P. D., 56, at p. 62.

(⁴) 10 C. B. (N.S.), 179; 30 L. J. (C.P.), 314.

quently to the date of that order the decree was made absolute. On appeal, Cairns, L.J., reversed the Vice-Chancellor's order, on the ground that the decree for the dissolution of marriage on becoming absolute took effect from the date of the decree *nisi*, and that consequently the order made in the interval was of no avail to reduce the fund into possession.

[LORD CAIRNS, L.J.: I cannot see that that decision has any application to the present question. It does not in any way determine the status of the wife during the currency of the decree *nisi*.]

After the decree has been made absolute the wife is only under one disability, namely, that she cannot marry again within the period of appeal. But the Legislature by prohibiting marriage impliedly gives her all the other rights of a *feme sole*. Then, since the decree absolute is made on precisely the same evidence as the decree *nisi*, it is to be inferred that the Legislature intended to give the wife upon the pronouncing of the decree *nisi* all the rights of a *feme sole* except that of marriage.

*[BRETT, L.J.: The powers upon the dissolution of [362 the marriage of entering into contracts and bringing actions are not powers given by the act, but common law rights arising upon the change of status.]

In the event of a decree for a judicial separation the wife is made a *feme sole* for the purposes of contracting, and bringing actions, and it could never have been intended that a woman in whose favor a decree *nisi* for dissolution had been pronounced should be in any less advantageous position.

LORD CAIRNS, L.C.: This is an action brought to recover the value of certain furniture and other goods of the plaintiff, which were illegally seized by the defendant. The plaintiff, in whose name alone the action was brought, was a lady in this position: proceedings had been taken by her in the Divorce Court for the dissolution of her marriage, and a decree *nisi* had been pronounced in November, 1874, which was made absolute in May, 1875, in the usual way. The defendant, in the interval, whilst the decree *nisi* was still current, pleaded (amongst others) this plea, that "at the time of the committing the alleged grievances the plaintiff was and still is the wife of George Lewis Norman," upon which plea issue was taken. At the trial, which did not come on until after the decree had been made absolute, Baron Huddleston nonsuited the plaintiff, giving leave to move to set aside the nonsuit and enter a verdict for the

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plaintiff. The propriety of that nonsuit was brought in question before the Exchequer Division, and that court was of opinion that the verdict should be entered for the plaintiff as being entitled to sue. The question whether she was so entitled involves the important question whether at the time in question she was a married woman. She might, it is true, have avoided the difficulty by making an application to a court of equity to use her husband's name, but she did not choose to take that course; she preferred to sue in her own name. The question, then, is one of status, and one which in my opinion must be answered unfavorably to the plaintiff. In my judgment her status was that of a married woman. The decree *nisi*, which is in the ordinary form, runs thus, "That the marriage . . . be dissolved" by rea-363] son of the respondent's adultery *and cruelty, "unless sufficient cause be shown to the court why this decree should not be made absolute within six months from the making thereof."

Taking that sentence as a whole, it is not a decree that the marriage is to be dissolved, but a contingent decree that it is to be dissolved unless within a time specified something else be done. This, then, is a decree beginning no doubt at the date of the order *nisi*, but not complete until it is made absolute, and until complete it is inoperative to alter the wife's status.

Then it was argued that, as upon a decree for judicial separation the wife may sue as a *feme sole*, so on a decree *nisi* for dissolution she should have at least as high a right. That might, perhaps, be a good argument to address to the Legislature to induce them to give her such a right. But as yet the Legislature have not done it; they have not given the parties any change of status until the decree absolute.

As for the authorities, all those which have been cited in argument are, with one exception, the case of *Prole v. Soady* (¹), unfavorable to the plaintiff's contention; and I do not think that that case affords any support to it, for I am utterly unable to see that it has any real bearing on the question of status. The observations I there used are these: "I am of opinion that, according to the act, it is impossible to hold otherwise than that the order *nisi* is the decree which the court eventually makes absolute against the parties. Therefore, I think the order absolute in this case took effect from the date of the order *nisi*, and that everything done in the interval was subject to the danger of being set

(¹) Law Rep., 3 Ch., 220.

aside by the order becoming absolute." And I am of opinion that those observations were correct with reference to the case with which the court then had to deal. It was not there intended to lay down as a broad rule that in all cases, and for all purposes, the decree, upon being made absolute, relates back to the date of the order *nisi*. So to construe the above observations is to overlook the important qualifying words "in this case;" they must be construed with reference to the particular subject-matter then before the court. There the question was whether a husband or his assignee could reduce into possession a fund standing in court to the wife's credit after a decree *nisi* had [364 been pronounced for the dissolution of the marriage. It is one thing for a court of equity to refuse to allow a husband, after a decree *nisi* has been pronounced, to reduce his wife's choses in action into possession, and thereby defeat her right of survivorship; it is quite another thing to say that the decree *nisi* alters the status of the parties.

I am of opinion then that until the Legislature otherwise orders, the status of a married woman remains the same until the decree is made absolute.

BAGGALLAY, L.J.: This action was properly brought if the plaintiff had lost her former status. That depends on whether the decree *nisi* had the effect of changing her status. I am of the same opinion as the Lord Chancellor that there is no effective decree until it has been made absolute.

BRETT, L.J.: In this action the judge at the trial non-suited the plaintiff on the ground that the action was improperly brought in her sole name, she being still a married woman at the time of the action brought. I should certainly have thought that the more proper course would have been to direct a verdict for the defendant on the ground that the plea was proved.

The question here depends upon what was the effect of the decree *nisi*, which was still running at the date of the plea. It was argued that the decree *nisi* by itself gave the wife the rights of a *feme sole*. I am however of opinion that that is not the case. In the first Divorce Act (20 & 21 Vict. c. 85) there was but one decree, absolute in the first instance, upon the pronouncing of which decree the wife at once acquired all the rights of a *feme sole* (with the one exception of re-marriage within the period limited for appeal). These rights, however, were not given by the act, but arose as common law rights upon the change of the status. Afterwards the Legislature, thinking it too abrupt a course to dissolve

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the marriage by a single decree, by 23 & 24 Vict. c. 144, altered the procedure, and substituted two decrees, one *nisi*, the other absolute. But the two decrees together are substituted for the single decree under the former act, not the decree *nisi* alone. The form of the decree *nisi* is this, "that the marriage be dissolved unless cause be shown"—not why 365] it should be set aside—but *"why it should not be made absolute." Until the decree is made absolute therefore there is no decree at all. On this point I think the case of *Hulse v. Hulse* (') is decisive.

But it was urged that when once the decree was made absolute there is a relation back of the dissolution to the date of the decree *nisi*, and therefore that as here the decree was made absolute before the trial the plaintiff ought to be considered as having been a *feme sole* at the time of the grievances committed and action brought. But I do not think that there is any relation back in that sense. There are obvious reasons for holding, as was held in the case of *Prole v. Soady* ("), that the decree when made absolute relates back so as to avoid any act done by the husband in the interval, for the purpose of reducing his wife's choses in action into possession; but I do not think that it relates back so as to alter the wife's status in that interval, or that the above case is any authority for such a proposition.

Judgment reversed.

Solicitor for plaintiff: *S. J. Debenham.*

Solicitor for defendant: *W. H. Roberts.*

(') Law Rep., 2 P. & D., 259.

(") Law Rep., 3 Ch., 220.

[2 Exchequer Division, 384.]

Feb. 14, 1877.

[IN THE COURT OF APPEAL.]

384] *WOODLEY V. THE METROPOLITAN DISTRICT RAILWAY COMPANY.

Master and Servant—Negligence—Sub-contractor under Railway Company—Common Employment.

The plaintiff, a workman in the employ of a contractor engaged by the defendants, had to work in a dark tunnel rendered dangerous by the passing of trains. After he had been working a fortnight he was injured by a passing train. The jury found that the defendants in not adopting any precautions for the protection of the plaintiff had been guilty of negligence:

Held, by the majority of the Court of Appeal (Cockburn, C.J., Mellor and Grove, JJ.), reversing the decision of the Court of Exchequer, that the plaintiff having continued in his employment with full knowledge, could not make the defendants liable for an injury arising from danger to which he voluntarily exposed himself:

Held by Mellish, and Bagallay, L.JJ., dissenting, that the plaintiff, as servant to

the contractor and not to the defendants, had entered into no contract with the latter which would modify the ordinary duty of those who carry on a dangerous business to take reasonable precaution that no one should suffer personal injury from the manner in which it is carried on; and that no such contract should be inferred from the plaintiff remaining in his employment.

THIS was an action tried before Kelly, C.B., at the Middlesex sittings for Hilary Term, 1874. The action was to recover damages for injuries received by the plaintiff through the alleged *negligence of the defendants [385 under the circumstances narrated in the judgments of the Court of Appeal. A verdict was found for the plaintiff for £300, leave being reserved to the defendants to move to enter a verdict for the defendants or a nonsuit. A rule *nisi* was accordingly applied for and obtained, on the ground that there was no breach of duty on the part of the defendants towards the plaintiff which caused the injury to him. Against this rule the plaintiff showed cause, and it was discharged by a judgment of the Court of Exchequer (Kelly, C.B., Cleasby and Amphlett, BB. (')), in Michaelmas Term, 1874.

The defendants appealed to the Court of Appeal.

(') The following were the judgments in the court below :—

KELLY, C.B., after stating the facts of the case, continued: This is an action against a railway company in which a rule has been obtained by Mr. Thesiger to enter a verdict for the defendants, the jury having found a verdict for the plaintiff with £300 damages. It appears to me, upon the facts of this particular case, the plaintiff is entitled to retain his verdict, and that the rule ought to be discharged.

It was an action against the Metropolitan District Railway Company by a workman who had been employed, not by the defendants, but by a contractor engaged by the defendants, to execute certain works in a tunnel very near to one of the metropolitan stations, and the defendants were charged with negligence, amongst other things, in not having provided somebody who should look out with a view to warn the workmen in this tunnel against approaching trains.

Now, the circumstances of the case appear to be these: The plaintiff had been employed to assist in the execution of certain works in this tunnel, which was dark. It appears that while the plaintiff was at work a train rapidly approached, came upon the spot,

ran against him, threw him down and inflicted the injuries upon him of which he complains in this action. It appeared that the train in question came along the railway by means of a curve, and that the curve terminated only within some twenty or thirty yards, or thereabouts, of the spot at which the plaintiff was working, so that he could not see the train approaching until it was within the distance of twenty or thirty yards, coming on rapidly. I do not propose to lay down any general rule upon the subject: certainly not to hold that in all cases where work is done in a dark tunnel and by a stranger, not a servant of the company, or by some one who has no connection with the company, it is the duty of the company to employ a look-out man to see when trains are approaching, and warn the workmen against any mischief arising; I do not say that there may not be many such cases in which no such duty is or ought to be imposed on the railway company. But in the circumstances of this particular case in which a train was approaching which the workman had no means of either seeing or hearing in time to enable himself to get out of the way, and so to avoid the mischief, the question arose, upon

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386] 1875. Feb. 24. *Cave*, Q.C., and *F. M. White*, for the defendants.

Francis, for the plaintiff.

[The following cases were cited: *Seymour v. Maddox* ('); *Indermaur v. Dames* ('); *Morgan v. Vale of Neath Ry. Co.* ('); *Wiggett v. Fox* ('); *Bilbee v. London, Brighton and South Coast Ry. Co.* ('); *Skelton v. London and North* 387] *Western Ry. Co.* ('); **Paterson v. Wallace* ('); *Bartonshill Coal Co. v. Reid* ('); *Holmes v. Clarke* ('); *Watling v. Oastler* (").

Cur. ado. vult.

which we have now to deliver an opinion, whether it was not the duty of the company to have stationed a look-out man at the corner of the curve to have warned the workman, who might then have avoided all danger. It appeared on some former occasion, and on some other part of the same railway, a look-out man had been employed, though no doubt that might have been done *ex majori cautela*, and it appeared also that after this accident had occurred a look-out man was thenceforth employed at the spot in question. Under these circumstances, and dealing only with the facts of this particular case, I am of opinion that the jury were fully justified in finding that it was the duty of the company to have provided a look-out man, and so prevented the mischief which actually occurred. That being so, it appears to me that the verdict ought not to be disturbed, and that the rule should be discharged.

CLEASBY, B.: I am not about to express an opinion at variance with that which has been given by the Lord Chief Baron, but I may add that this case has been much considered, and the delay in delivering the judgment has arisen perhaps in a great measure from my having felt a good deal of difficulty upon this ground—the plaintiff appeared to me to expose himself voluntarily, that is, as a man who was paid for the work he was doing, and to expose himself voluntarily to a known danger, the danger being that he is to work in a tunnel near to a curve where trains are passing every six minutes, and therefore the risk which he appears to take upon himself is not always being prepared to get out of the

way as each train comes. As to that I cannot help thinking, for his own safety, he would necessarily rely very much upon himself, and that placing himself voluntarily in that position, incurring that risk voluntarily, he cannot complain if the consequence is that in a particular case he is not prepared to get out of the way, and the train comes against him. One might apply the maxim, *Volenti non fit injuria*: he takes the risk upon himself, and there is no wrong if the consequence arises which is likely to arise upon his taking it. But my learned Brothers in this case see sufficient evidence to show that by the conduct of the defendants, and I may say the improper conduct, the plaintiff was exposed to greater dangers than those which he took upon himself in the way I have mentioned: and if that be so, then it follows he has a right to complain.

AMPHELETT, B.: I agree in the judgment delivered by my Lord in this case, limiting it, as he has done in his judgment, to the particular circumstances of the case, and laying down no general rule.

Rule discharged.

(¹) 16 Q. B., 326; 20 L. J. (Q.B.), 327.
(²) Law Rep., 1 C. P., 274; Law Rep., 2 C. P., 311.

(³) Law Rep., 1 Q. B., 149.

(⁴) 11 Ex., 882.

(⁵) 18 C. B. (N.S.), 584; 34 L. J. (C.P.), 182.

(⁶) Law Rep., 2 C. P., 631.

(⁷) 1 Macq. H. L. Cas., 748.

(⁸) 3 Macq. H. L. Cas., 266.

(⁹) 7 H. & N., 937; 31 L. J. (Ex.), 356.

(¹⁰) Law Rep., 6 Ex., 78.

1877. Feb. 14. THE COURT (Cockburn, C.J., Mellish and Baggallay, L.JJ., Mellor and Grove, JJ.), having differed in opinion, the following judgments were read by Baggallay, L.J.:

COCKBURN, C.J.: In this case, which was an action to recover damages for an injury sustained by the plaintiff from one of the defendants' trains having struck him while at work on their premises, the jury found for the plaintiff with £300 damages; but a rule was obtained, on leave reserved, to enter a verdict for the defendants, on the ground that the plaintiff having voluntarily exposed himself to the danger, the defendants were not bound to adopt precautionary measures for his protection.

The facts of the case were as follows: The plaintiff was a workman in the employ of a contractor engaged by the defendants to execute certain work on a side wall on their line of railway in a dark tunnel. Trains were passing the spot every ten minutes, and the line being there on a curve, the workmen would not be aware of the approach of a train till it was within twenty or thirty yards of them. The space between the rail and the wall, on which the workmen had to stand while at work, was just sufficient to enable them to keep clear of a train when sensible of its approach. The place in question was wholly without light. No one was stationed to give notice of an approaching train. The speed of the trains was not slackened when arriving near where the men were at work, nor was any signal given by sounding the steam whistle. It is unnecessary to say that the service on which the plaintiff was thus employed was one of extreme danger. While he was reaching across the rail to find a tool he had laid down a train came upon him suddenly, and struck and seriously injured him.

It appeared that on a previous occasion, when similar work was being done, a look-out man had been stationed to give warning of approaching trains, but this precaution had been discontinued.

*Under these circumstances I have no hesitation in [388 saying that, morally speaking, great culpability attached to the defendants for having omitted to adopt any precautionary measures to lessen as much as possible the danger to which the plaintiff and his fellow workmen were exposed. The jury have found that they were herein guilty of negligence, and, according to the recent decision of the House of Lords in *Bridges v. North London Ry. Co.* ('), the question of negligence, if there is any evidence to go to the jury, is

(') Law Rep., 7 H. L., 213.

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for the jury and not for the court. But in this case I am bound to say that, in my view, so far as the question of negligence was concerned, not only was there evidence to go to the jury, but the verdict was in this respect perfectly right. Whether, notwithstanding that the injury to the plaintiff was caused by the negligence of the defendants, the latter are in point of law liable is a different question, and one on which I have had considerable difficulty in making up my mind.

If the plaintiff, in doing the work on the railway, is to be looked upon as the servant of the company, the decision of the Court of Exchequer in his favor cannot, as it seems to me, be upheld. It could not be said that any deception was practised on the plaintiff as to the degree of danger to which he would be exposed. He must be taken to have been aware of the nature and character of the work and its attendant risks when he entered into the employ of the contractor for the job in question, or at all events he must have become fully aware of it as soon as he began to work. If he had been misled in supposing that precautionary measures such as the dangerous nature of the service rendered reasonably necessary would be taken, he had a right to throw up his engagement and to decline to go on with the work; and such would have been his proper course. But with a full knowledge of the danger, he continued in the employment, and had been working in the tunnel for a fortnight when the accident happened. A man who enters on a necessarily dangerous employment with his eyes open takes it with its accompanying risks. On the other hand, if the danger is concealed from him and an accident happens before he becomes aware of it, or if he is led to expect, or may reasonably expect, that proper precautions will *be adopted by the employer to prevent or lessen the danger, and from the want of such precautions an accident happens to him before he has become aware of their absence, he may hold the employer liable. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or in the alternative to quit the service. If he continues to take the benefit of the employment, he must

take it subject to its disadvantages. He cannot put on the employer terms to which he has now full notice that the employer never intended to bind himself. It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible, as I certainly think the company were in the present instance. The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury.

But it may be said the plaintiff was not in the service of the defendants at all. He was on their premises not only on lawful business, but it may be said by their invitation, as he was working under a contractor employed by them to do the work in question. He sustained the injury complained of through what the jury have found to have been negligence on the part of the company, *he is there- [390 fore entitled to damages. But this reasoning appears to me to be fallacious. That which would be negligence in a company, with reference to the state of their premises or the manner of conducting their business, so as to give a right to compensation for an injury resulting therefrom to a stranger lawfully resorting to their premises in ignorance of the existence of the danger, will give no such right to one, who being aware of the danger, voluntarily encounters it, and fails to take the extra care necessary for avoiding it. The same observation arises as before: with full knowledge of the manner in which the traffic was carried on, and of the danger attendant on it, the plaintiff thought proper to remain in the employment. No doubt he thought that by the exercise of extra vigilance and care on his part the danger might be avoided. By a want of particular care in depositing one of his tools he exposed himself to the danger, and unfortunately suffered from it. He cannot, I think, make the company liable for injury arising from danger to which he voluntarily exposed himself. The contractor, the im-

mediate employer of the plaintiff, undertook to execute work which he knew would be attended with danger in the circumstances under which it was to be executed. The plaintiff as his servant did the same. They are in a very different position from that in which they would have stood had they been at work on the defendants' premises in ignorance of the danger.

The conclusion, therefore, at which I have arrived, I must say with much regret, as I think the conduct of the defendants open to great reprehension, is that the judgment of the Court of Exchequer is wrong and must be reversed.

MELLISH, L.J.: The course which the argument in this case has taken makes it desirable to consider, in the first place, whether railway companies are under any obligation to take reasonable care that the servants of contractors, who are brought on the line for the purpose of repairing the works of the railway, do not suffer personal injury from the passing trains. In the court below it seems to have been taken for granted that railway companies were under such an obligation, but it is now contended that they are under no such obligation, and that the servant of the contractor, 391] *if he does not like to incur the risk of being run over, must throw up his employment with his master, and that however great may be the risk to which he is exposed, and however great may be the negligence of the arrangements of the railway company with respect to the running of their trains, he has no action against the railway company for any injury he may suffer. Now there can be no doubt that by the law of this country every person who carries on a dangerous trade is bound to take reasonable care that no other person (not being his own servant) suffers a personal injury from the manner in which his trade is carried on. No one has a right to carry on his trade in such a manner as is likely to cause personal injury to others. This liability is not founded on contract. It may be modified or taken away by contract, but it is founded on the right which is inherent in every one, not to be subject to personal injury from the wrongful or careless act of another. In the case of a servant who enters into the service of a master who carries on a dangerous trade, the right of the servant to be protected in his person is largely modified by the contract between master and servant. The servant is considered to contract that he will run all the ordinary risks arising from the nature of his master's business and from the regulations under which it is carried on, and all risks arising from the negligence of his co-servants; but the

servant of the contractor enters into no such contract with the railway company, because he enters into no contract with the railway company at all, and his contract with his own master is *res inter alios acta*, and in my opinion is altogether immaterial. I am unable to discover any principle by which railway companies are freed from the liability of taking reasonable care that the servants of contractors are not injured by the passing trains. I think the company is entitled to assume that contractors' laborers who are brought on their line to do repairs are persons who have reasonable nerve and reasonable skill in avoiding danger; but if the company's arrangements are such that persons who have as much nerve and as much skill in avoiding danger as it can be expected contractors' laborers would have, are nevertheless exposed to an undue risk of personal injury, I think that the company are liable for any personal injury they may in consequence suffer. The work which the plaintiff in this *case was employed to do was not in itself [392 dangerous at all. It was disagreeable work, because it was to be performed in a dark and dirty tunnel; but the danger to which the plaintiff was exposed arose entirely from the act of the company in running their trains, and it is because the danger arose from the act of the company, that the company were the persons upon whom the duty lay to see that the trains were run in such a manner and with such precautions that the servants of the contractors, who were working in the tunnel with the leave and for the benefit of the company, were exposed to no undue risk.

This being, in my opinion, the nature of the liability of the company, I have next to consider whether there was any evidence that the plaintiff, on the occasion in question, was, through the negligent arrangements of the company, exposed to a greater risk of personal injury than he ought to have been, and I agree with the court below there was such evidence. The question I have to decide is not whether I myself, if I had been on the jury, should have found that the company's arrangements were negligent, but whether there was evidence from which a jury might reasonably so find. This question mainly depends upon the degree of skill and nerve in avoiding passing trains which may reasonably be expected from a bricklayer's laborer in a dark tunnel. This is obviously a question of fact, on which it is utterly impossible to lay down any rule of law. The jury, under the direction of the judge, have found that under all the circumstances of the case, the darkness of the tunnel, there being a curve at the place the plaintiff was working

so that an approaching train could not be seen, the noise of the work and of trains passing on the other side making it difficult to hear an approaching train, the plaintiff was not sufficiently protected from the risk of personal injury. The jury have also expressed an opinion that the proper precaution to have been taken was for the company to have placed a man to warn the workmen when a train was coming. I am quite unable to say whether this would have been a proper or a sufficient precaution, but I cannot hold that the conclusions to which the jury have come on pure questions of fact, on which it seems to me some men might reasonably come to one conclusion and some to another, were so wrong [393] that the court is entitled to enter a verdict for *the defendants on the ground that there was no evidence to go to the jury.

It was argued, however, strongly on the part of the defendants, that as the plaintiff had been working in the tunnel for a fortnight, though not at the spot at which he was working when the accident happened, and knew that the company were running their trains as usual without taking any precautions for the protection of the workmen in the tunnel, he must be taken to have assented to the trains being so run, and on that account cannot recover. This, as I understand, is the objection which made Baron Cleasby doubt in the court below whether the rule should not be made absolute to enter a verdict for the defendants. Now this defence in substance amounts to a defence of leave and license, and it is possible that, though the plaintiff has not bound himself by any contract with the defendants to take upon himself all risk arising from the passing trains, yet he may have licensed the defendants to run their trains as usual without taking any precautions to protect him, and it is necessary to consider whether it was proved that he did so.

Is it, then, a necessary inference in point of law from the fact of the plaintiff having worked in the tunnel for a fortnight without making any objection, and without abandoning his service with his master, that he consented to the company's running their trains as usual without taking any precautions for the safety of the workmen in the tunnel? In my opinion it is not. In the first place it is by no means certain that the plaintiff, an ordinary bricklayer's laborer, understood at all what the extent of the risk was which he was running, or what the precautions were which were reasonably necessary. In the next place, assuming that he did understand what the risk was which he was running, and that he knew that the workmen in the tunnel were not

reasonably protected, it seems to me it would be extremely unjust to hold that he was obliged either at once to quit his master's employment or else to lose his right of action against the railway company for negligently running over him. I think he is entitled to say, "I know I was running great risk, and did not like it at all, but I could not afford to give up my good place from which I get my livelihood, and I supposed that if I was injured by their *careless- [394 ness I should have an action against the company, and that if I was killed my wife and children would have their action also." Suppose this case: a man is employed by a contractor for cleansing the street, to scrape a particular street, and for the space of a fortnight he has the opportunity of observing that a particular hansom cabman drives his cab with extremely little regard for the safety of the men who scrape the streets. At the end of a fortnight the man who scrapes the streets is negligently run over by the cabman. An action is brought in the county court, and the cabman says in his defense: "You know my style of driving, you had seen me drive for a fortnight, I was only driving in my usual style." "Yes, but your usual style of driving is a very negligent style, and my having seen you drive for a fortnight has nothing to do with it." It will not be disputed the scraper of the streets in the case I have supposed is entitled to maintain his action, and in my opinion his case does not differ from the case we have to determine, there being no contract between the defendants and the plaintiff any more than between the cabman and the scraper of the streets. On the whole, I am of opinion that the judgment of the court below ought to be affirmed.

BAGGALLAY, J.A.: I agree with Lord Justice Mellish in thinking that the judgment of the court below should be affirmed.

In the view which I take of the case the plaintiff cannot be regarded as a servant of the company; he was the servant of the contractor; and at the time when the accident occurred he was upon the premises of the company in the course of fulfilling, on behalf of his employer, a contract in which his employer and the company were jointly interested: he was there upon lawful business, and not upon bare permission. If this be the true view of the case, it appears to me that it cannot be distinguished, in principle, from that of *Indermaur v. Dames* (¹), and that there was a duty imposed by law on the company either to avert the

(¹) Law Rep., 1 C. P., 274; Law Rep., 2 C. P., 311.

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danger or to give the plaintiff reasonable notice of it, so that he might protect himself.

Was there then, in fact, neglect on the part of the company in either of these respects? I fully assent to the view 395] that the *company had a right to expect that the contractor's laborers would be men possessed of a reasonable amount of skill in the performance of their duties, of knowledge of the ordinary risks to which their employment exposes them, and of prudence in avoiding the dangers to which they were subjected; but the circumstances of the present case were very peculiar; the accident which occurred to the plaintiff was not occasioned by the work upon which he was engaged, as by the falling of any portion of the brickwork, or the giving way of a scaffold, but by the company running their trains at the time when that work was going on; the real question is whether the company's train was run in such a manner, and with such precautions, that the plaintiff was not exposed to any undue risk; and this was essentially a question for the jury. As has been stated by the Lord Justice, it is impossible to lay down any general rule of law applicable to cases of this description; each must depend upon its own circumstances. The jury found a verdict for the plaintiff; the learned judge by whom the case was tried was not dissatisfied with that verdict, and the Court of Exchequer have concurred in it. So far as I am competent to form an opinion from the materials before us, I agree with the jury in thinking that reasonable precautions were not taken by the company for the protection of the plaintiff. Whether the jury were right or not in the opinion which they expressed as to what would have been a sufficient precaution, it is immaterial to consider.

It was contended on the part of the company that they were under no obligation to adopt measures for the protection of the servants of a contractor against the careless or negligent acts of their own servants; that the plaintiff, and other persons similarly situated, must enter upon such employment at their own risk, and that unless they were willing to do so they should refuse to be so employed. If this is the true state of the law the company would probably be entitled to have the judgment of the court below reversed; but I cannot adopt this view, concurring as I do most entirely in the reasons assigned, by Willes, J., in delivering the judgment of the court in the case of *Indermaur v. Dames* ⁽¹⁾, to which I have already alluded.

(1) Law Rep., 1 C. P., 274; Law Rep., 2 C. P., 311.

***MELLOR, J.:** I am of opinion that the judgment [396 of the Court of Exchequer must be reversed.

The defendants can only be made liable on the proof of some negligent conduct on their part which occasioned the accident by which the plaintiff was injured, and I can discover none.

The Lord Chief Baron in his judgment suggests, and it is upon this matter alone that he relies as the foundation of the liability of the defendants, that it was reasonable for the jury to hold that there was an obligation and duty imposed upon the company, in this case for the preservation of human life, to have stationed a man at the bend of the curve who would have been enabled, on the approach of the train, to have warned the workman, and enabled him to escape danger. Whether any such precaution, even were it possible, would have been of any practical value may be doubtful, considering the number of trains passing in the tunnel, but, if it were, I can see no ground for inferring such an obligation and duty to have existed under the circumstances on the part of the company. Whether it might have been a prudent thing for the contractor to have stipulated for additional precautions, when he undertook the repair of the tunnel, is quite a different question, but I can see no implied obligation on the part of the company, at their expense, to employ such a person, as the Lord Chief Baron referred to. No such person was, in any sense, necessary for the proper and ordinary working of the defendants' trains, or conducting their business, and it is not suggested that there was anything done by the company or omitted by the company, in the mode of working their trains or carrying on their business, of an unusual character, or in any respect differing from the course of working which they had used during the period of the plaintiff's employment, and it seems to me that in principle, so far as the liability of the defendants is concerned, the case does not differ from that of *Ellis v. Great Western Ry. Co.* (*). It is now completely settled that a master is not liable to one servant for the consequences resulting from the negligence of a fellow servant in the course of the same employment, on the ground that the servant undertakes as between himself and his master the natural risks and perils incident to the performance of his duty, *and the presumption is that such [397 risks are considered in the wages: *Morgan v. Vale of Neath Ry. Co.* (*). When, therefore, the contractor in this case undertook to perform the work in question, and in the per-

(*) Law Rep., 9 C. P., 551.

(*) Law Rep., 1 Q. B., 149.

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formance of which the plaintiff was engaged at the time of the accident, it is reasonable to assume that the character and nature of the work was duly considered and included in the price paid for it; and if the plaintiff thought that there was danger of an unusual character in the nature of the work, he ought either to have stipulated with his master or the company to provide some additional means or precautions against such possible danger, or, as he was better able to judge than they whether the work could safely be performed without additional precautions, he ought to have refused the task unless they were provided.

Now, whether the master has done anything which may make him liable as between himself and the plaintiff we are not concerned to decide. *Priestly v. Fowler* (¹), which is a leading case on the subject, has a strong bearing upon this state of things, and throws light upon the principle upon which this case may be decided. In that case it was said by Lord Abinger, in delivering the judgment of the court, "The mere relation of master and servant can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of the servant in the course of his employment to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends danger to himself, and in most cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as his master."

In the present case the plaintiff had probably the same opportunity of judging of the possible danger as his master had, and might have declined the work, and refused to undertake it, without additional precautions being taken or means provided by his master, but, as it appears to me, that was a matter affecting his relation with his master, and not in any way affecting the duty of the company.

398] *I think that the company can in no respect be said to be guilty of negligence. They conducted the business in the ordinary way, and the accident did not occur through any misconduct or mismanagement on their part. I think that the plaintiff, who must be presumed to know the ordinary traffic of the company, and the limited space within which he had to work, came within the maxim, *Volenti non*

(¹) 3 M. & W. 1.

remaining due, owing and unpaid for the work, labor and services done, performed and

juria, and has, at all events, no remedy against the lants.

GALLAY, J.A.: Mr. Justice Grove has not written a judgment, but he agrees in that of Mr. Justice r, and, as the majority of the court are in favor of the ants, the form of the judgment will be to enter the t for the defendants.

Judgment to enter the verdict for the defendants.

itor for plaintiff: *D. Aston.*

itors for defendants: *Burchells.*

Alb. L. J., 174; 2 Pars. Cont., p.; 16 Am. Rep., 502 note.

a servant enters upon em- t; from its nature necessarily is, he assumes the usual risks is of the service, and also those ich are apparent to ordinary ion.

oticut: Hayden v. Smithville, Conn., 548.

sh: Clarke v. Holmes, 7 Hurl. 937; Seymour v. Maddox, 16 26; Assop v. Yates, 2 H. & N., iestly v. Fowler, 3 M. & W., 1; s v. Clough, 3 H. & N., 258.

is: Chicago, etc., v. Donahue, 106; Toledo, etc., v. Durkin, 395; Columbus, etc., v. Troesch, 545; Chicago, etc., v. Clark, 2 11, 596; Gartland v. Toledo, 111, 498.

Greenleaf v. Dubuque, etc., 52.

ucky: Sullivan v. Louisville, Bush, 81.

ouri: Hulett v. St. Louis, etc., 239; Cagney v. Hannibal, etc., ouri Bar, 70.

ork: Gibson v. Erie Railway, Y., 449; Laning v. The Central 49 N. Y., 521; Falkner v. Erie y, 49 Barb., 324; Loonam v. ay, 28 How. Pr., 472; Ryan v. 8 N. Y. Weekly Dig., 212.

of the perils of a servant of a l company is the transmitting en cars to the shop of the com- r repairs: Flanagan v. Chicago, Wisc., 98.

rvant by accepting employment t assume the risk of accident vicious animal—as a Siberian

blood-hound—escaping from his fast- ening and injuring such servant. The

most that could be said is that he as- sumed the risks consequent upon the keeping of a ferocious dog, to be kept fastened up, save when he was other- wise notified, and beyond this he was entitled to the same protection as other persons: Muller v. McKesson, 73 N. Y., 195.

The master is not liable for the neg- ligence of a co-employé:

Canada, Upper: Plant v. Grand Trunk, 27 U. C. Q. B., 78.

Colorado: Summerhays v. Kansas, etc., 2 Col., 484.

Illinois: Gartland v. Toledo, etc., 67 Ills., 498; Toledo, etc., v. Durkin, 76 id., 895; Columbus, etc., v. Troesch, 68 Ills., 545.

Michigan: Michigan Cent. v. Dolan, 32 Mich., 511.

Mississippi: N. O., etc., v. Hughes, 49 Miss., 258.

Missouri: McGowan v. St. Louis, etc., 61 Mo., 528; Gurnley v. Vulcan, etc., 61 Mo., 492.

Pennsylvania: Lehigh Valley, etc., v. Jones, 86 Penn. St. R., 492.

Wisconsin: Brabbits v. Chicago, etc., 88 Wisc., 289.

Though a third person cannot defend on the ground of contributory negli- gence of a co-servant of the plaintiff: Perry v. Lansing, 17 Hun, 84.

The rule of non-liability of a master to a servant, for injuries occasioned by the negligence of a co-servant, cannot be invoked to shield the owner of a vicious animal from liability for injuries to a servant, where a fellow servant was negligent in not properly fastening the animal, or in not giving notice of its being loose: Muller v. McKesson, 73 N. Y., 195.

Where the negligence of an engineer

of a train, in running it, is contributory with that of the company in not sending a sufficient number of brakemen, and both together cause an injury to an employé, the negligence of the engineer does not relieve the company from liability: *Booth v. Boston, etc.*, 73 N. Y., 88.

Where the servant has full and equal knowledge with his master that the machinery or materials employed are defective, or that the fellow servant is incompetent, and he remains in the service, this may constitute contributory negligence; but if it appears that the master has promised to amend the defect, or other like inducement to remain has been held out to the servant, the mere fact of his continuing in the employment does not, of itself, as matter of law, exonerate the master from liability, but the question of contributory negligence is one for the jury: *Laning v. N. Y. Cent. R. R.*, 49 N. Y., 521; *Holmes v. Clarke*, 6 Hurl. & Norm., 349, 2 Am. Law Reg., N.S., 107; *Greenleaf v. Dubuque*, 33 Iowa, 52; *Chicago, etc., v. Platt*, 8 Monthly Jur., 23, Sup. Ct. Ills.; *Stevenson v. Jewett*, 16 Hun, 210.

See, however, *Patterson v. Pittsburgh, etc.*, 76 Penn. St. R., 389.

Where the court refused to charge that plaintiff could not recover if the deceased knew that trains were sent out with seventeen or more cars and only two brakemen, and he had always gone on such trains, held not to be error, as it did not appear that the deceased had any knowledge that a train which preceded his own on the morning in question, and which caused the injury, had only two brakemen, or that the accident happened because of their being but two: *Rose v. Boston, etc.*, 58 N. Y., 217; *Balt., etc., v. Woodward*, 41 Maryland, 268.

See *Sprong v. Boston, etc.*, 58 N. Y., 56; *Booth v. Boston, etc.*, 73 N. Y., 88.

If a servant accepts service with knowledge of the character and position of structures, from which employes might be liable to receive injury, he cannot call upon his master to make alterations to secure greater safety, or in case of injury hold him liable:

Ireland: See *Skerritt v. Scallan*, *Irish L. R.*, 11 C. L., 389.

Kentucky: *Sullivan v. Louisville, etc.*, 9 Bush, 81.

Missouri: *Nolan v. Shickle*, 1 Missouri Bar, 64; *Cagney v. Hannibal, etc.*, Id., 70.

New York: *Gibson v. Erie Railway*, 63 N. Y., 449; *Falkner v. Erie Railway*, 49 Barb., 324.

Pennsylvania: See *Patterson v. Pittsburgh, etc.*, 76 Penn. St. R., 389.

It cannot be affirmed, as a matter of law, that an engineer, while running an engine upon a railroad, has the same opportunity as the corporation, or whatever subordinates may represent it, whose duty it is to keep the track in repair, to ascertain and know of defects; and in case of injury to him, in consequence of such defects, he cannot be deemed guilty of contributory negligence simply because he knew that the track was somewhat out of repair. It seems, however, that if the engineer knew that the track was so badly out of repair that it was dangerous to run over it, by continuing in the employment after such knowledge he assumed the risk, and the corporation is not liable for the injury. *Mehan v. Syracuse, etc.*, 73 N. Y., 585.

The duty of the master to the servant, and the implied contract between them, is to the effect that the master shall furnish proper, perfect and adequate machinery or other appliances, necessary for the proposed work, and also shall employ skilful and competent fellow servants, or shall use due and reasonable care to that end. This duty or contract is to be affirmatively and positively fulfilled and performed. It is not enough that the master selects one or more general agents of approved skill and fitness and confers upon them the power of selecting, purchasing or hiring. If the general agent carelessly places by the side of the servant another, unskilled and incompetent, and damage results to the servant in consequence, the master is liable; and this is so, whether the incompetency or want of skill of the fellow servant existed when he was hired, or has come upon him since, and he has been continued in service with notice or knowledge, or the means of knowledge, upon the part of the master, of the defect. It is the duty of the master to his servant to discharge from his service, upon

notice thereof, any other servant, who from any cause, as for example intoxication, has ceased to be competent and skilful: *Laning v. N. Y. Cent. R. R.*, 49 N. Y. § 521, explaining *Wright v. N. Y. Cent. R. R.*, 25 N. Y., 562.

Alabama: *Alabama, etc., v. Waller*, 48 Ala., 459.

Canada, Upper: See *Deverell v. Grand Trunk, etc.*, 25 U. C. Q. B., 517.

Georgia: See under special contract, *Western, etc., v. Bishop*, 50 Geo., 465.

Illinois: *Malone v. Western Trans. Co.*, 5 Bissell, 319 note; *Perry v. Ricketts*, 55 Ills., 234; *Columbus, etc., v. Troesch*, 68 Ills., 545; *Chicago, etc., v. Donahue*, 75 Ills., 106; *Toledo, etc., v. Conroy*, 68 Ills., 660; *Chicago, etc., v. Taylor*, 69 Ills., 461; *Quincey, etc., v. Hood*, 77 Ills., 68; *Toledo, etc., v. Moore*, 77 Ills., 217; *Toledo, etc., v. Ingraham*, 77 Ills., 310; *Indianapolis, etc., v. Flanagan*, 77 Ills., 365; *Camp, etc., v. Ballou*, 71 Ills., 417; *Allerton, etc., v. Egan*, 86 Ills., 253.

See *Mercer v. Jackson*, 54 Ills., 397; *Camp, etc., v. Ballou*, 71 Ills., 417; *Toledo, etc., v. Eddy*, 72 Ills., 138; *Allerton v. Egan, etc.*, 86 Ills., 253; *Chicago, etc., v. Munroe*, 85 Ills., 25.

Iowa: See *Lumley v. Caswell*, 47 Iowa, 159.

Ireland: *Skerritt v. Scallan*, Irish L. R., 11 C. L., 389; *Hoey v. Dublin, etc.*, 5 id., 206.

Kentucky: *Sullivan v. Louisville*, 9 Bush, 81.

Maine: *Lawler v. Androscoggin, etc.*, 61 Maine, 463; *Shaumy v. Androscoggin*, 66 Maine, 420.

Massachusetts: *Arkerson v. Denison*, 117 Mass., 407; *Ford v. Fitchburgh, etc.*, 110 Mass., 240; *Avilla v. Nash*, 117 Mass., 318.

See *Colton v. Richards*, 123 Mass., 484.

Michigan: *Fort Wayne, etc., v. Gildersleeve*, 83 Mich., 133; *Botsford v. Mich., etc.*, 83 Mich., 256.

See *Michigan Cent. v. Dolan*, 32 Mich., 510.

Minnesota: *Leclair v. First, etc.*, 20 Minn., 9; *Thompson v. Deymala*, 1 North Western Rep., N.S. (Minnesota Div.), 17.

See *Griffiths v. Wolfram*, 22 Minn., 185.

Mississippi: *Hurd v. Miss., etc.*, 21 ENG. REP. 66

50 Miss., 178; *N. O., etc., v. Hughes*, 49 Miss., 258.

Missouri: *Porter v. Hannibal, etc.*, 60 Mo., 160; *Cummings v. Collins*, 61 Mo., 520; *Conroy v. Vulcan, etc.*, 62 Mo., 351; *Whalen v. Centenary, etc.*, 62 Mo., 326; *Steiner v. Moran*, 2 Mo. App., 47.

See *Hulett v. St. Louis, etc.*, 67 Mo., 239; *Elliott v. St. Louis, etc.*, 67 Mo., 272.

New Brunswick: *McDonald v. McFee*, 3 Pugsley, 159.

New York: *Finnerty v. Prentice*, 8 N. Y. Weekly Dig., 206; *Falkner v. Erie Railway*, 49 Barb., 327; *Gibson v. Erie Railway*, 63 N. Y., 449; *Laning v. N. Y. Cent. R. R.*, 49 N. Y., 521, explaining *Wright v. N. Y. Cent. R. R.*, 25 N. Y., 562; *Flike v. B. & A. R. R.*, 53 N. Y., 549; *Corcoran v. Holbrook*, 59 N. Y., 517; *King v. N. Y. Cent. R. R.*, 79 N. Y., 607; *Bradley v. N. Y. Cent. R. R.*, 62 N. Y., 99; *Plank v. N. Y. Central, etc.*, 60 N. Y., 607; *Swords v. Edgar*, 59 N. Y., 28; *Baulec v. N. Y., etc.*, 59 N. Y., 356; *Coughtry v. Great, etc.*, 56 N. Y., 124; *Chapman v. Erie Railway Co.*, 55 N. Y., 579; *Booth v. Boston, etc.*, 78 N. Y., 88; *Buckner v. N. Y. Cent. R. R.*, 2 Lansing, 506; *Stevenson v. Jewett*, 16 Hun, 210.

See *Piper v. N. Y. Cent., etc.*, 56 N. Y., 630; *Tinney v. B. & A. R. R.*, 52 N. Y., 632.

North Carolina: *Crutchfield v. Richmond, etc.*, 78 N. C., 300.

Oregon: *Stone v. Oregon, etc.*, 4 Oregon, 52.

Pennsylvania: *Mullan v. Philadelphia*, 78 Penn. St. R., 25.

See *Patterson v. Pittsburgh, etc.*, 76 Penn. St. R., 389.

Tennessee: *Nashville, etc., v. Carroll*, 6 Heisk., 347.

Wisconsin: *Brabbitts v. Chicago, etc.*, 38 Wisc., 289; *Wedgwood v. Chicago, etc.*, 44 Wisc., 44.

As to the extent of investigations which the master must make as to alleged acts of carelessness on the part of a servant, see *Baulec v. N. Y., etc.*, 59 N. Y., 356; *Couch v. Watson, etc.*, 5 Cent. L. J., 108, 110 note; *Chapman v. Erie Railway*, 55 N. Y., 579; *Michigan Central v. Dolan*, 32 Mich., 510; *Chicago, etc., v. Platt*, 8 Monthly Jur., 23, Sup. Ct. Ills.

It is the duty of a railway company to keep its tracks free from obstructions, rendering their use unnecessarily hazardous; and if through neglect of that duty an employé is injured, he may recover: negligence of an agent of the company is its negligence: *Bessex v. Chicago*, 45 Wisc., 477.

Declaration by the administratrix of W., that defendants were owners of a factory and machine, and W. was employed by them to work thereon, and in the course of his employment it was necessary to enter the machine to clean it; that by the negligence of the defendants it was unsafely constructed and in a defective condition, and was, by reason of not being sufficiently guarded, unfit to be used and entered, as the defendants well knew; and by reason of the premises and also by reason, as the defendants well knew, of no sufficient apparatus having been provided by them to protect W., it was suddenly put in motion whilst he was at work in the machine, and he thereby sustained injuries, from which he afterwards died. On demurrer, held, that the declaration sufficiently showed that the machine was set in motion by the defendants' negligence, and that it therefore disclosed a cause of action, although there was no allegation that W. was ignorant of the dangerous and defective character of the machine. It seems defendants would, under the circumstances, be liable even if the machine had been set in motion by a stranger: *Watkins v. Oaster*, L. R., 6 Exch., 73.

See *Holmes v. Clarke*, 6 Hurl. & Norm., 349, 2 American L. Reg., N.S., 107.

A master is responsible to a servant for injuries received by the latter from defects in the building in which the services are rendered—as from the fall of a privy—which the master knew, or ought to have known: *Ryan v. Fowler*, 24 N. Y., 410, questioning *Seymour v. Maddox*, 16 Q. B., 326.

Where a farmer, having no knowledge of times for trains, was hired by an overseer of a railroad to assist in clearing its tracks of snow, under an agreement that the engineer should protect him from injury by approaching trains, by notice thereof, held the company was liable for failure of its

overseer to so notify him: *Bradley v. N. Y. Cent. R. R.*, 62 N. Y., 99.

Where the master is sued for negligence alleged to have caused an injury of his servant—as the falling of a bank—the test of liability is not whether the master omitted to do something which he could have done and which would have prevented the injury, but whether he did anything which, under the circumstances, in the exercise of ordinary care and prudence, he ought not to have done, or omitted any precaution which a prudent and careful man would or ought to have taken: *Leonard v. Collins*, 70 N. Y., 90.

Where the owner of an instrument or piece of machinery, not in its nature dangerous, allows another person competent to manage it to take and use it, and while in the possession and use of the other it becomes defective and injures a third person, the owner is not liable, and the fact that the right to use it was given under a contract by which it was to be used in performing work for the owner upon his premises, does not change his liability: *King v. N. Y. Cent.*, etc., 66 N. Y., 181.

See *S. C.* on second appeal, 72 N. Y., 607.

Obedience to the regulations of a railroad company in regard to the running of its trains, with a view to their safety, is matter of executive detail, which neither the corporation nor any general agent of it can personally oversee, but as to which employé must be relied upon; and in the absence of any proof of a distinction between the duty of the company in starting trains and in subsequently running them, it will not be assumed. For negligence, therefore, in the observance, or for disobedience of regulations as to the running or starting of trains to the injury of an employé, in the absence of other proof of negligence, the corporation is not liable: *Rose v. Boston*, etc., 58 N. Y., 217; *Balt.*, etc., *v. Woodward*, 41 Maryland, 268.

See *Sproung v. Boston*, etc., 58 N. Y., 56; *Booth v. Boston*, etc., 67 N. Y., 593; *Flike v. Boston*, etc., 58 N. Y., 549.

A master is not responsible to an employé for the negligent act of a competent and proper foreman, to whom there has been no delegation of power

and control of the business, or a branch thereof, but who is simply charged with special duties, performing them under the direction of the master, the latter retaining general control and supervision. It is only where the master withdraws from the management of the business, intrusting it to a middleman or superior servant; or where, as in the case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligent acts of one thus acting in his stead: *Malone v. Hathaway*, 64 N. Y., 5, reversing 6 New York Supreme Court Rep., 1, and distinguishing *Lanning v. N. Y. Central R. R.*, 49 N. Y., 521, and *Flike v. B. & A. R. R.*, 53 N. Y., 549.

If there exist facts known to the employer and unknown to the employé, increasing the risk of such employment beyond its ordinary hazards, the employer is bound to disclose such facts to his employé; otherwise he will be liable as for negligence in case of injury to the latter, resulting from such unusual risks.

California: *Baxter v. Roberts*, 44 Cal., 187, 18 Am. L. Reg., N.S., 41, 43 note.

English: *Williams v. Clough*, 3 Hurl. & Norm., 258; *Addison on Torts* (4th Eng. ed.), 417.

Indiana: *Hill v. Gust*, 55 Ind., 45 and cases cited, pp. 49-50.

Ireland: See *Smyly v. Glasgow*, etc., Irish L. R., 2 C. L., 24.

Maine: See *Lawler v. Androscoggin*, etc., 61 Maine, 463.

Massachusetts: *O'Connor v. Adams*, 120 Mass., 427; *Walsh v. Peet*, etc., 110 Mass., 23; *Combs v. New Bedford*, etc., 102 Mass., 572.

Minnesota: See *Anderson v. Morrison*, 22 Minn., 274.

Missouri: *Keegan v. Kavanaugh*, 62 Mo., 230.

New York: *Stevenson v. Jewett*, 16 Hun, 210; *Finnerty v. Prentice*, 8 N. Y. Weekly Dig., 206.

As to duty of master to instruct a child in the dangerous character of work in which he is engaged, *Finnerty v. Prentice*, 8 N. Y. Weekly Dig., 206:

Oregon: *Stone v. Oregon*, etc., 4 Oregon, 52.

Pennsylvania: *Patterson v. Pittsburgh*, etc., 76 Penn. St. R., 389.

Rhode Island: *Maine v. Oriental*, etc., 11 R. I., 152.

United States, Supreme Court: *Union*, etc., v. Fort, 17 Wall., 533, 1 Am. L. T. Rep., N.S., 121.

Wisconsin: *Strahlendorf v. Rosenthal*, 30 Wisc., 674.

If, however, the servant knowing the dangerous character of the employment or the machinery he is using, be injured therein, the master is not liable:

English: *Williams v. Clough*, 3 H. & N., 258.

Indiana: *Brown v. Byroads*, 47 Ind., 435.

Iowa: *Lumley v. Caswill*, 47 Iowa, 159.

Ireland: See *Smyly v. Glasgow*, etc., Irish L. R., 2 C. L., 24.

Minnesota: See *Anderson v. Morrison*, 22 Minn., 274.

Missouri: *Keegan v. Kavanaugh*, 62 Mo., 230; *Nolan v. Shickle*, 1 Missouri Bar, 64; *Cagney v. Hannibal*, etc., 1 Mo. Bar, 70.

New York: *Jones v. Roach*, 41 N. Y. Superior Ct. R., 248; *Gibson v. Erie Railway*, 63 N. Y., 449.

Oregon: *Stone v. Oregon*, etc., 4 Oregon, 52.

Pennsylvania: See *Patterson v. Pittsburgh*, etc., 76 Penn. State Rep., 389.

The master is not, however, liable to one servant for the negligence of a co-employé not a superior in the proper sense of the term:

Ireland: See *Skerritt v. Scallan*, Irish L. R., 11 C. L., 389.

Massachusetts: *Colton v. Richards*, 123 Mass., 484.

Missouri: *Cagney v. Hannibal*, etc., 1 Mo. Bar, 70.

New York: *Besel v. N. Y. Cent.*, etc., 70 N. Y., 171, reversing 9 Hun, 457; *Sammon v. N. Y.*, etc., 92 N. Y., 251; *Hoffnagle v. N. Y. Cent.*, etc., 55 N. Y., 608; *Falkner v. Erie Railway*, 49 Barb., 324.

See, however, *Booth v. Boston*, etc., 7 N. Y. Weekly Dig., 107, Court Appeals.

Pennsylvania: *Lehigh Valley*, etc., v. *Jones*, 86 Penn. St. R., 432.

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When the person inflicting the injury is held to be a fellow workman:

Canada, Upper: Plant v. Grand Trunk, 27 U. C. Q. B., 28.

Illinois: Gartland v. Toledo, etc., 67 Ills., 498; Chicago, etc., v. Clark, 2 Bradw., 596.

Ireland: Conway v. Belfast, etc., Irish L. R., 9 C. L., 498, affirmed 11 id. 345.

Maine: Lawler v. Androscoggin, etc., 61 Maine, 463, 16 Am. R. 492, 497 note; Howd v. Miss., etc., 50 Miss., 178.

Massachusetts: Johnson v. Boston, 118 Mass., 114.

Mississippi: N. O., etc., v. Hughes, 49 Miss., 258.

Missouri: Gormley v. Vulcan, etc., 61 Mo., 492; McGowan v. St. Louis, etc., 61 Mo., 528.

Tennessee: Nashville, etc., v. Carroll, 6 Heisk., 347.

And when not:

Illinois: Toledo, etc., v. O'Connor, 77 Ills., 892; Toledo, etc., v. Ingraham, 77 Ills., 810.

Ireland: Ramsay v. Quinn, Irish L. R., 8 C. L., 322.

Maine: Shaumy v. Androscoggin, 66 Maine, 420.

Massachusetts: Avilla v. Nash, 117 Mass., 318.

Minnesota: Gormley v. Vulcan, etc., 61 Mo., 492.

New York: Loensen v. Atlantic, etc., 57 N. Y., 108; Roll v. Northern, etc., 15 Hun, 496; Stevenson v. Jewett, 16 Hun, 210.

Pennsylvania: Baird v. Pettit, 70 Penn. St. R., 477; Mullan v. Philadelphia, 78 Penn. St. R., 25; Lehigh Valley, etc., v. Jones, 86 Penn. St. R., 432.

Rhode Island: Mann v. Oriental, etc., 11 R. I., 152.

Tennessee: Nashville v. Carroll, 6 Heisk., 347.

The rule that a servant cannot recover of his master for damages sustained from the negligence of his fellow servant, does not prevent his maintaining an action against his master for consequential damages by him sustained through an injury to his wife from such negligence: Gannon v. Housatonic, etc., 112 Mass., 234.

[2 Exchequer Division, 422.]

June 26, 1877.

[IN THE COURT OF APPEAL.]

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*DIGGLE V. HIGGS.

Gaming—8 & 9 Vict. c. 109, s. 18—Money deposited with Stakeholder when recoverable—Wager.

An agreement to walk a match for £200 a side, the money being deposited with a stakeholder, is a wager, and null and void under 8 & 9 Vict. c. 109, s. 18. And the deposit of the money is not a subscription or contribution for a sum of money to be awarded to the winner of a lawful game within the proviso of that enactment: and although the winner of the match cannot sue the loser or the stakeholder to recover the stakes, yet a depositor may maintain an action to recover back the share deposited by him with the stakeholder.

The plaintiff and one S. agreed to walk a match for £200 a side, and each deposited £200 with the defendant to be paid to the winner. S. won the match. The plaintiff, after the determination of the match, but before the money was paid over to S., demanded the sum deposited by him from the defendant:

Held, that the plaintiff was entitled to recover his share of the deposit from the defendant.

Batty v. Marriott (5 C. B., 818) overruled.

ACTION to recover from the defendant the sum of £200.

At the trial before Huddleston, B., at the Manchester

Spring Assizes, 1877, the following facts appeared in evidence:—

On the 28th of July, 1876, the plaintiff and one Simmonite entered into the following agreement, which was signed by both *parties: "Articles of agreement between [423] Simmonite and T. Diggle, to walk at Higginshaw grounds, Oldham, on the 19th of October, 1866, for £200 a side. T. Diggle to receive 100 yards start in one mile. £25 a side down in the hands of C. Higgs, stakeholder; second deposit, £25 each, to be made on August 5, at Unwin's, up to 9 o'clock; third deposit of £50 each on September 16; and the final £100 each to be made at 12 o'clock, the day of walking. The men to be on their marks at 10 o'clock. All the money to be deposited in C. Higgs' hands. Perkins referee, and C. Higgs final stakeholder and pistol-firer. Either parties not agreeing to these articles to forfeit the money down."

Pursuant to this agreement the defendant received £200 down from each of the competitors. On the 19th of October the walking match took place, and the referee, Perkins, decided that Simmonite had won the match. On the 21st of October, before the defendant had paid over the stakes to Simmonite, the plaintiff's solicitor gave the defendant a written notice not to pay Simmonite, and demanded a return of the sum of £200 deposited by the plaintiff with the defendant. Subsequently the defendant, pursuant to the referee Perkins' decision, paid the whole of the £400 to Simmonite.

These facts being admitted, after argument, the learned judge, on the authority of *Batty v. Marriott* (*), directed the judgment to be entered for the defendant, on the ground that the case was within the proviso in s. 18 (*).

Edwards, Q.C., for the plaintiff: The question is whether the plaintiff having demanded the sum deposited with the defendant *as stakeholder before he has paid it over, [424] but after the event has happened, can recover it back. According to the authorities it is clear that he can. In *Hastelow v. Jackson* (*) Bayley, J., says: "If a stakeholder pays

(*) 5 C. B., 818.

(*) By 8 & 9 Vict. c. 109, s. 41, all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to

abide the event on which any wager shall have been made; provided always that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.

(*) 8 B. & C., at p. 225.

over money without authority from the party and in opposition to his desire he does so at his peril." That statement of the law was approved of in *Hampden v. Walsh* (¹), and that case is a direct authority for the plaintiff. By 8 and 9 Vict. c. 109, s. 18, all contracts by way of gaming or wagering are null and void, and it makes no difference in the present state of the law whether the wager is legal or illegal, even assuming a foot-race to be a legal game, the plaintiff having demanded his deposit before it was paid over is entitled to recover it from the defendant. *Batty v. Marriott* (²) is, no doubt, an authority for the defendant, but that case was disapproved of in the Court of Appeal in *Batson v. Newman* (³). It will be contended for the defendant that the payment of the money to the defendant is "a subscription or contribution for or towards any plate, prize, or sum of money to be awarded to the winner of a lawful game, sport, pastime, or exercise," within the meaning of the proviso in s. 18. But in this case the agreement between the parties is a wager; the one bets the other that he will beat him in a walking match; the persons who deposit the money are personally interested in an event which is uncertain; it is a wager between the two persons, and not within the proviso. *Varney v. Hickman* (⁴), *Martin v. Hewson* (⁵), and *Graham v. Thompson* (⁶) are also authorities to show that the plaintiff is entitled to recover back the money deposited.

C. Russell, Q.C., and *Crompton*, for the defendant: The agreement between the plaintiff and Simmonite is not a wager, and the money paid to the defendant is a subscription towards a sum of money to be awarded to the winner of a lawful game within the proviso in s. 18. The plaintiff therefore cannot recover in this action. This question has been decided in *Batty v. Marriott* (²). It was there held that a foot-race was a legal game, and that a sum of money [425] which each of two persons deposited with a stakeholder to abide the event of a foot-race to be run between them was a subscription for a sum to be awarded to the winner of a lawful game. *Batson v. Newman* (³) is distinguishable. There there was a bet between two persons that a horse would cover a certain distance in a given time; it was a race against time; it is clear that was not a lawful game. The earlier decisions proceeded on the ground that a stakeholder is in the position of an agent or arbitrator;

(¹) 1 Q. B. D., 189.

(²) 5 C. B., 818.

(³) 1 C. P. D., 573.

(⁴) 5 C. B., 271; 17 L. J. (C.P.), 102.

(⁵) 10 Ex., 737; 24 L. J. (Ex.), 174.

(⁶) 2 Ir. Rep., C. L., 64.

he receives the money in that character, his authority may be revoked before the event has happened, but a revocation is too late after it has come off. A walking match is not unlawful, and a subscription of money to be paid to the winner clearly comes within the proviso. Two persons may subscribe towards a sum of money, and the circumstance that there are only two persons who subscribe, and that they are competitors, does not make it the less a subscription. The words of the proviso are "subscription or contribution." Subscription would include the money of competitors, be they two or more, and contribution would be the money received from third persons. After the event has come off the defendant holds the money not for the persons who have deposited it, but for the winner; the winner alone, if anybody, can sue for it. If the winner cannot sue, neither can the plaintiff, for the second clause of s. 18 provides that no suit shall be brought for recovering any sum of money which shall have been deposited in the hands of any person to abide the event on which the wager shall have been made. No doubt *Varney v. Hickman* (*) and *Martin v. Hewson* (†) have decided that that clause relates to the case where a winner brings an action against a loser, seeking to recover the wager from the loser; but in *Savage v. Madder* (‡) Martin, B., expresses an opinion that no action of any kind can be brought with respect to betting contracts, the object of the act being to prevent trials in courts of law with respect to betting transactions, and in *Hampden v. Walsh* (§) the court seem to invite a review of these decisions in a court of appeal. In all the cases in which the money has been recovered back, except *Varney v. Hickman* (*), the games were illegal.

**Edwards*, Q.C., was not heard in reply.

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LORD CAIRNS, L.C.: The first question which we must ask ourselves is, was this contract a wager? It seems to me beyond a doubt that it was a wager; it was a wager between two men for a walking match. They agreed to walk at the Higginshaw grounds for £200 a side; it is not the less a wager because the money was deposited with the defendant as stakeholder. When the wager was decided, the winner would be paid the £200 deposited by the loser, and receive back his own £200. Now upon that, what is the construction of s. 18 of 8 & 9 Vict. c. 109? Is a contract of this kind excepted by the proviso? We start with this, that the contract was clearly a wager, and was within the first part of

(†) 5 C. B., 571.

(§) 10 Ex., 787; 24 L. J. (Ex.), 174.

(*) 36 L. J. (Ex.), 178.

(‡) 1 Q. B. D., 189.

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the section. That section says all contracts and agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and then there is a proviso which follows upon an intervening sentence in these words: "And no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to have been won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." Then comes the proviso on which this question mainly rests: "Provided always that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

It is clear that there may be in scores of forms "subscriptions, or contributions" towards a plate or prize without there being any wager, and I cannot read this proviso, which has a natural and intelligible meaning, in a different way, and one which would have the effect of neutralizing the enactment. The Legislature, I think, never intended to say that there should be no action brought to recover a sum of money which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made, and yet that if the wager is in the form of a subscription or contribution the winner may recover it. I read the proviso thus: Provided that so long as there is a 427] subscription *which is not a wager the second part of the section shall not apply to it. There is no authority in favor of the view of the defendant except *Batty v. Marriott* ('), and if that authority is to be followed it cannot be denied it is a very strong authority for the defendant. What the court had in their minds in that case was the question whether the game was a lawful or an unlawful game, and having come to the conclusion that it was a lawful game, they were of opinion that there was nothing in the case which was struck at by the act of Parliament, and that the act was only intended to strike at unlawful games. That view seems to me to be erroneous, and I think that the court overlooked the first part of the section, which applies to all contracts, lawful or unlawful, by way of gaming or wagering. When *Batson v. Newman* (") came before this court, although there was a certain degree of difference between that case and *Batty v. Marriott* ('), yet it is obvious

(') 5 C. B., 818.

(") 1 C. P. D., 573.

that *Batty v. Marriott* (') did not meet with approval. I cannot follow that case. I therefore think that although there was a deposit of money, the contract in this case was a wager, and that all the consequences which are imposed by s. 18 on contracts by way of wagering follow.

Then it is said that this is an action by a party to the contract, and that he has revoked the authority given to the defendant to pay over the money, on the ground that the contract is void, and that s. 18 has taken away his right to maintain an action under that part of the section which says "no suit shall be brought for recovering money which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." On that I must observe, that in *Hampden v. Walsh* (') the Queen's Bench Division appeared to have been of opinion that an action under similar circumstances could be maintained; and in *Batty v. Marriott* (') the objection was not taken. Be that as it may, I am of opinion that that objection cannot be maintained. The section amounts to this: all contracts by way of gaming and wagering are null and void; and then, dealing with those contracts, it says that no action shall be brought with respect to them: that is to say, all gaming contracts are void, *and the winner of the [428 game or wager shall not maintain a suit against his antagonist or the stakeholder. This construction makes one member of the section in unison with the other. What legal right there may be to recover back money paid under a contract that is void, the statute leaves it untouched. The decision of the learned judge was wrong, and I think that the judgment ought to be entered for the plaintiff.

COCKBURN, C.J.: I think that the judgment in this case ought to be entered for the plaintiff. I concur in thinking that the agreement is substantially a wager. I further think that the case is not protected by the proviso at the end of s. 18. In my opinion that proviso was intended to meet the case of *bona fide* contributions to a prize to be given to the winner in some lawful competition, but not to money deposited by way of wager. I confess I entertain considerable doubt on the other question. If it were *res integra* I should have thought that this action was excluded by the provision in s. 18, which says that no suit shall be brought to recover any sum of money which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. I think that what the statute was intended to effect there was that whereas,

(') 5 C. B., 818.

21 ENG. REP.

(') 1 Q. B. D., 189.

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but for the statutory provision, after the event had come off a winner might insist on having the money paid to him, or, before the event, the person who had deposited the money might have recovered it back from the stakeholder, the statute was intended to strike at all wagers: it was intended to hit both these possibilities, in order that the time of the court should not be taken up with litigation of this sort. The intention was that the man who won the wager should not recover the stakes, or the man who had deposited his money get it back again; that neither the one nor the other should receive any assistance from the courts, but should get their money as best they could. But whatever may be my own opinion, this point has been before two courts; once before the Court of Common Pleas in *Varney v. Hickman* (*), and again before the Court of Exchequer in *Martin v. Hewson* (*), and both courts put a construction on this enactment contrary to the view I entertain. 429] *I am not desirous to disturb the law as thus settled, and I do not wish to take further time to consider the question.

BRAMWELL, L.J.: I agree in opinion with the Lord Chancellor. I think the construction put upon this section is the right one. I only wish to add that the clause of s. 18, that "no suit shall be brought for recovering money won upon a wager" is unnecessary, and might have been left out of the statute; it seems to me to be wholly superfluous. I think the judgment entered for the defendant wrong, and that the plaintiff is entitled to recover his deposit from the defendant.

Judgment reversed and entered for the plaintiff.

Solicitors for plaintiff: *Richards & Walker*, for Mellor, Oldham.

Solicitors for defendant: *Singleton & Tattershall*.

(*) 5 C. B., 271; 17 L. J. (C.P.), 102.

(*) 10 Ex., 787; 24 L. J. (Ex.), 174.

In *Amory v. Gilman* (6 Mass., 1), which was a suit upon a wager policy, the court said (p. 6):

"It would seem a disgraceful occupation of the courts of any country, to sit in judgment between two gamblers, in order to decide which was the best calculator of chances, or which had the most cunning of the two. There could be but one step of degradation below this—which is, that the judges should be the stakeholders of the parties."

See Bishop on Cont., §§ 489-490.

A promissory note payable on condition that a certain person should be elected to a certain office, is void, as against public policy: *Lockhart v. Hullinger*, 2 Bradw., 465.

In New York (under the statute, 1 R. S., 662), the statute makes it a misdemeanor, subject to a fine, against every person, on conviction, who shall win or lose, at play or by betting at any time the sum of \$25, or upwards, within the space of twenty-four hours.

It also makes the winner of any sum

or value, by playing at any game, subject to a *forfeiture* of five times the value of the money, or other things won: *Lynch v. Todd*, 13 How. Pr., 546.

The *receiving*, or holding, or paying over money as *stakes*, is not made *criminal*; nor is the *stakeholder* subjected to any penalty or forfeiture by the statute. He is only liable to a civil action for the recovery of the amount received by him, whether he shall have paid it over or not: *Lynch v. Todd*, 13 How. Pr., 546.

The losing party to an illegal bet or wager may, *under the statute*, recover the sum deposited by him, although the *stakeholder*, by his direction given immediately after the wager is determined, has paid the money over to the winner: *Ruckman v. Pitcher*, 1 N. Y., 392, dissenting op., 8 N. Y. Leg. Obs., 177; *Lewis v. Miner*, 8 Den., 103; *Doxey v. Miller*, 2 Bradwell, Ills., 80, 32-3.

In many of the states it is held that the stakeholder can in no sense be regarded as a party to the illegal contract, or in *pari delicto*. He is a mere depositary of both parties, respectively, with a naked authority to deliver it over on the proposed contingency. If the authority is actually revoked before the money is paid over, it remains a naked deposit to the use of the depositor:

Connecticut: *Hale v. Sherwood*, 40 Conn., 332; *Wheeler v. Spencer*, 15 Conn., 28.

Ireland: *Thomas v. Thompson*, Irish L. R., 2 C. L., 64.

Massachusetts: *Fisher v. Hildreth*, 117 Mass., 558; *Love v. Harvey*, 114 Mass., 80; *Ball v. Gilbert*, 12 Met., 397.

Michigan: *Whitwell v. Carter*, 4 Mich., 329.

Minnesota: *Wilkinson v. Tousley*, 16 Minn., 299.

New Hampshire: *Perkins v. Eaton*, 8 N. H., 155.

Pennsylvania: *McAllister v. Hoffman*, 6 S. & R., 147.

Vermont: *Tarleton v. Baker*, 18 Verm., 9.

Each depositor can only recover the portion belonging to himself: *Ruckman v. Pitcher*, 20 N. Y., 9, affirming 13 Barb., 556.

See *Haywood v. Sheldon*, 13 Johns., 88; *Yates v. Foot*, 12 Johns., 1.

The action, under the statute of betting and gaming, must be brought by the real depositor, although the name of another may have been used in making the wager: *Ruckman v. Pitcher*, 20 N. Y., 9, affirming 13 Barb., 556.

In an action to recover from a stakeholder money deposited with him by the plaintiff, upon a bet on a cock-fight, the evidence was that within fifteen minutes after the termination of the fight, the plaintiff told the defendant to "give up the money to Courtney (the other party to the wager); it was Courtney's money": Held, error in the judge to submit to the jury, upon this evidence, the question whether the plaintiff directed the money to be paid over as money won upon the event of the cock-fight, or whether, without regard to any wager, and as a voluntary gift or gratuity. He should have instructed them, as a matter of law, to find a verdict for the plaintiff.

The submission by the judge, to the jury, of an hypothesis wholly unwarranted by the evidence, is error for which a new trial will be awarded: *Storey v. Brennan*, 15 N. Y., 524.

But where the stake which was won was an article of personal property, which the loser retained in his possession, and when the event was determined against him, purchased it of the winner and paid him for it in money, and then sued him for it in trover, treating the sale to himself as a conversion by the defendant, held that he could not recover.

Whether, if the suit had been for the money paid upon the purchase, he could have recovered, *quere*? *Lewis v. Miner*, 8 Den., 103.

An action to recover money deposited on an illegal wager may be maintained without demand: *Ruckman v. Pitcher*, 1 N. Y., 392, and dissenting op., 8 N. Y. Leg. Obs., 177.

Though he can only recover interest from a demand or the bringing of the suit: *Ruckman v. Pitcher*, 20 N. Y., 9.

A party who stakes a sum of money on an illegal wager, may recover so much thereof as belongs to himself, without joining in the action other persons who contributed specific portions of the fund: *Ruckman v. Pitcher*, 1 N. Y., 392, and dissenting op., 8 N. Y. Leg. Obs., 177.

And he can only recover the portion

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belonging to himself: *Ruckman v. Pitcher*, 20 N. Y., 9.

Ivory markers, issued by the keeper of a gaming establishment as representatives of money deposited with him by the players, were won by him: *Held*, that the amount of money which they represented was recoverable from him by the loser: *Meech v. Stoner*, 19 N. Y., 26, affirming 22 Barb., 82.

If the owner of the money receive part and give a receipt in full, such receipt is not a bar to a suit to recover the balance: *Hendrickson v. Beers*, 6 Bosw., 639.

In an action against a stakeholder, to recover money deposited with him as a bet or wager upon the result of a horse-race, it must appear that there were two or more contracting parties having mutual or reciprocal rights to the money or things wagered.

The plaintiff in this case put into the defendant's hands, who was secretary of a driving association, \$60 as an entrance fee, to entitle him to trot his horse over the race course in competition with other horses for two purses of \$300 each. The plaintiff trotted one of said races, and was beaten, and the other race was withdrawn on account of bad weather, and the association tendered the plaintiff \$30, which he refused to receive.

In an action against the defendant to recover the \$60 thus deposited, held that there was not any such contract of wager between the plaintiff and defendant as could sustain the action: *Jordan v. Kent*, 44 How., 206.

The losing party to a bet or wager who, after the event is known, has paid or delivered to the winner the money or property staked, may sustain an action to recover it back: *Lewis v. Miner*, 3 Den., 103; *Love v. Harvey*, 114 Mass., 80; *Fisher v. Hildreth*, 117 Mass., 558.

Money knowingly lent to be used in betting or gaming cannot be recovered from the borrower: *Peck v. Briggs*, 3 Den., 107.

But where one borrowed money to bet on an election, and deposited it with the lender as a stakeholder and lost the bet, and the stakeholder paid it to the winner on his agreeing to return it in case the loser who had borrowed it would not repay it; held that such agreement was not against

the policy of the statute, but was binding: *Peck v. Briggs*, 3 Den., 107.

And where the winner, after receiving the money as above stated, agreed that if the stakeholder would sue the loser for the money which he had borrowed and staked, and should fail to recover, he (the winner) would, in addition to returning the money, pay the costs of the suit; held that this also was a valid agreement, and not in conflict with the terms or policy of the statute: *Peck v. Briggs*, 3 Den., 107; *Wells v. Mann*, 45 N. Y., 327; *White v. Baxter*, 71 N. Y., 254; *Macklin v. Kerr*, 27 U. C. Com. Pl., 47.

But see *Padden v. Tronson*, 45 Wisc., 126.

The plaintiff staked his watch and chain on the throw of the dice, and lost, by reason of a trick or cheat on the part of his adversary. The stakeholder delivered the property to the winner, who sold it for value, and without notice, to the defendant. In an action of replevin, held that no title passed to the winner which he could convey to a purchaser, and that the plaintiff could recover the property of the defendant.

A man cannot be divested of the title to his property by means of a cheat and conspiracy; and even an innocent purchaser from one who so obtains it is not entitled to protection against the claim of the true owner.

The rule of protection to a *bona fide* purchaser of property obtained by fraud does not apply, unless it appears that the owner intended to transfer both the property in, and possession of, the goods to the person guilty of the fraud. If his intention was to deliver nothing more than the bare possession, there is no contract of sale, and the property does not pass: *Hodge v. Sexton*, 4 Thompson & Cooke, 54, 1 Hun, 576.

By the statute of New York, a negotiable promissory note given on a gambling transaction is void in the hands of even a *bona fide* holder. A default for want of an answer, on sufficient excuse being shown, will be set aside, and the defendant allowed to interpose the defence that the note sued on was given for money won at play: *Bank, etc., v. Gifford*, 40 Barb., 659.

The indorsement of a draft, by the

owner, in payment of a gambling debt, although the paper were issued prior to the incurring of the debt and for a legal consideration, comes within the inhibition of the gaming act (Wagn. Stat., 661), and in contemplation of that statute, the indorsed draft may be treated as a security or a new bill. Such indorsement, under the statute, is void, and conveys no title. And where the draft is assigned or transferred by the party receiving it, to another, also cognizant of the facts, who collects the amount, he will be held to have converted the instrument and its proceeds, and will be liable to the owner for the sum collected. And *semble*, that the same liability will attach even though such third party be ignorant of the wager: *Williams v. Wall*, 60 Missouri, 318.

See to same effect *Dorey v. Miller*, 2 Bradwell (Ills.), 80; *Chapin v. Dake*, 57 Ills., 295.

An action to recover back money lost at play is not an action for a penalty: By pleading to a declaration, after a demurrer thereto has been overruled, defendant abandons the demurrer.

The New York Revised Statutes apply to all sums lost by gaming: *Phillips v. Sture*, 1 Code Rep., 58.

In an action for money alleged to have been lost by the plaintiff at play, a complaint similar to a declaration in *indebitatus assumpsit*, under the former practice, is not sufficient. The complaint must be special; the plaintiff must set out the facts and bring himself within the statute by force of which he claims to recover: *Moran v. Morrissey*, 28 How. Pr., 100, 18 Abb. Pr., 131; *Langworthy v. Bromley*, 29 How. Pr., 92; *Arnetta v. Morrissey*, 1 Abb., N.S., 439; *Stannard v. Eytlinge*, 33 How. Pr., 262, 3 Abb., N.S., 42, 5 Rob., 90.

See *Moak's Van Sant*, Pl., 192, 339; *Graham v. Thompson*, Irish L. R., 2 C. L., 64.

In Upper Canada, where plaintiff and A. made a bet upon a horse-race, and deposited the money with defendant as stakeholder, it was held that the bet was illegal, as neither of the parties owned either of the horses, and they were not running for any other stake. A. won, and the defendant paid over the money on his order, having been previously notified by the plaintiff not to do so. Held, also, that the plaintiff might recover back the amount from defendant as money had and received: *Anderson v. Galbraith*, 16 U. C. Q. B., 57; *Fisher v. Hildreth*, 117 Mass., 558.

See also *Ruckman v. Pitcher*, 1 N. Y., 392, and dissenting op., 8 N. Y. Leg. Obs., 177.

The right to recover money lost at gambling is assignable: *McDougall v. Walling*, 48 Barb., 364; *Hendrickson v. Beers*, 6 Bosw., 639; *Meech v. Stoner*, 19 N. Y., 26, affirming 22 Barb., 82.

The right to recover for money so lost is a demand arising on contract, and may be set up as a counter claim: *McDougall v. Walling*, 48 Barb., 364.

Though a party who has bet money upon the result of an election is entitled to recover the same of the stakeholder, yet when the deposit was made in the bills of a bank which failed before the suit was brought, and no demand had been made of the stakeholder, and there was no evidence that he had parted with the bills, it was held that he was only liable for the value of them at the time of bringing the action.

An action against a stakeholder, to recover money deposited as a party to a bet, is barred by the statute of limitations, unless brought within three years after the cause of action accrued, such action being maintainable only by virtue of the statute concerning betting and gaming: *Fowler v. Van Surdam*, 1 Den., 557; *Langworthy v. Bromley*, 29 How. Pr., 92, 95.

[2 Exchequer Division, 429.]

June 26, 1877.

[IN THE COURT OF APPEAL.]

THOMPSON V. THE SUNDERLAND GAS COMPANY.

Gasworks Clauses Act, 1847 (10 Vict. c. 15), ss. 6, 7—Powers of Gas Company to break up Soil and lay down Pipes—Buildings.

By s. 6 of 10 Vict. c. 15, the undertakers are authorized to open and break up the soil and pavement of the several streets within the limits of their special act and to lay down pipes for supplying gas. Sect. 7 provides "that nothing herein shall authorize the undertakers to lay down or place any pipe or other works, into, through, or against any building, or in any land not dedicated to the public use, without the consent of the owners and occupiers thereof . . .

A road passed alongside the plaintiff's premises, and over certain arches occupied by him as cellars. The defendants, a company constituted under a local act incorporating 10 Vict. c. 15, in opening and breaking up the soil of the road for the purpose of laying down gas-pipes, damaged the arches:

Held, that the arches were buildings within s. 7, and that the defendants could not justify breaking through them.

THE statement of claim, amongst other things, stated that the plaintiff was the owner of a certain ship-building yard, situate on the side of a certain public road, which road passed over several arches belonging to and possessed by the plaintiff, and occupied and used by him as store rooms in connection with his business as a shipbuilder; that the 430 defendants, in laying down certain *gas-pipes, opened up and excavated the public road and dug trenches therein, and so negligently conducted the laying down the gas-pipes that the arches were greatly damaged by the defendants having broken and cut up the brickwork of the top of the arches, whereby they were rendered unfit for use.

The statement of defence, amongst other things, alleged that the defendants, under the powers of certain acts of Parliament, took up and excavated the public road to replace certain gas-pipes, and in performing the work in a proper and careful manner, and in order to avoid injuring a certain wooden casing placed under the public road by the plaintiff, laid their gas-pipes at a level which made it necessary to take off the top bricks of one of the arches, and to lay pipes thereupon; and that the same was done by them in careful and proper execution of the powers under their acts of Parliament and without negligence.

At the trial, before Lopes, J., at the Durham Spring Assizes, 1877, it was proved that the road in question passed alongside the plaintiff's premises, and over arches which belonged to the plaintiff, and which opened out into his yard; that they had doors attached to them, and were

used by the plaintiff as stores or cellars. There was no evidence to show how the arches came to be under the road, or when they were first used as cellars, but it appeared that some cottages had formerly been erected near to this spot, and it was suggested that the arches had been used as cellars by the occupiers. It was also proved that the defendants, in laying down gas-pipes, opened the soil of the road, and broke in the crown of the arches, thereby causing an injury to the amount of £25.

The defendants, who were a gas company incorporated under 20 & 21 Vict. c. vii, with which 10 Vict. c. 15 was incorporated, contended that their acts were lawful and justified by s. 6 (1) *of 10 Vict. c. 15. The jury having negatived any negligence on the part of the defendants in laying down the pipes, the learned judge directed the judgment to be entered for them.

M'Clymont, for the plaintiff: The judgment is wrongly entered for the defendants. At common law the surface of the road alone is dedicated to the public, not the soil underneath the road; the defendants would have no right to break through the arches and destroy the plaintiff's property. They claim to justify their acts under 10 Vict. c. 15, s. 6. Assuming that the defendants have power under that section to open and break up the soil of the street or road for the purpose of laying down their pipes, s. 7 prohibits

(1) By 10 Vict. c. 15, s. 6, the undertakers, under such superintendence as hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special act, and may open and break up any sewers, drains, or tunnels within or under such streets or bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works, and from time to time repair, alter, or remove the same, and also make any sewers that may be necessary for carrying off the washings and waste liquids which may arise in the making of the gas; and for the purposes aforesaid may remove and use all earth and materials in and under such streets and bridges, and they may in such streets erect any pillars, lamps, and other works, and do all other acts which the undertakers shall from time to time deem necessary for supplying gas to the inhabitants of the district included within the said limits, doing as little damage as may be in the execution of the powers hereby or by

the special act granted, and making compensation for any damage which may be done in the execution of such powers.

By s. 7: Provided always that nothing herein shall authorize or empower the undertakers to lay down or place any pipe or other works into, through, or against any building, or in any land not dedicated to the public use, without the consent of the owners and occupiers thereof: except that the undertakers may at any time enter upon and lay or place any new pipe in the place of an existing pipe in any land wherein any pipe hath been already lawfully laid down or placed in pursuance of this or the special act, or any other act of Parliament, and may repair or alter any pipe so laid down.

By s. 2: The expression "the undertakers" shall mean the persons by the special act authorized to construct the gasworks.

By s. 8: The word "street shall include . . . road."

them from laying down their pipes into, through, or against any buildings or in any land not dedicated to the public use, without the consent of the owner. It is admitted that the consent of the owner has not been obtained; the arches which have been interfered with are cellars in the possession of the plaintiff, and although they are underneath the soil are buildings within the meaning of s. 7.

Herschell, Q.C., and *Shield*, for the defendants: If the cellars are buildings within s. 7, and the case is not within s. 6, then the defendants would be powerless to lay down pipes for the purpose of supplying gas in this part of their district, and great inconvenience would be caused to the public. 432] Sect. 6 gives the defendants *power to break up the soil of streets or roads within the limits of their act for the purpose of laying down pipes, and this necessarily gives them power to interfere with the arches or cellars that may be underneath. If, in exercising their powers, the defendants have broken the crown of the plaintiff's arches he is not without his remedy; he is entitled under the same section to compensation for the damage that has been done him, but he cannot bring an action of trespass against the defendants. Buildings in s. 7 must be construed to mean buildings on the surface of the land, and not buildings that are underground.

M'Clymont was not heard in reply.

LORD CAIRNS, L.C.: This case raises a very simple question upon the construction of ss. 6 and 7 of 10 Vict. c. 15. The defendants, the gas company, were exercising, as they thought right, the powers given to them by their act of Parliament, and supposing they had parliamentary powers for what they did, the jury have found that there was no negligence in the exercise of those powers. If they had, therefore, on the construction of this act of Parliament, parliamentary powers for what they did, there is an end of the case, and they are right: if on the other hand they had not parliamentary powers for what they have done they are in the wrong, and the plaintiff is entitled to judgment, and it is agreed that the damage which he has sustained in respect of this part of the case is £25.

Now what the gas company have done is this: they were laying pipes under a road, the road was in part supported by brick arches, which were underneath, and the company in laying their pipes opened the soil of the road, and came down upon those brick arches and broke into them to some extent, and in breaking into the arches caused the injury, the damages of which were assessed at £25. Now, s. 6 of the Gas Clauses Act, which is incorporated with the special

act (20 & 21 Vict. c. vii), gives the undertakers certain powers with regard to streets and bridges. The powers it gives them are these: [The Lord Chancellor read s. 6.] Now, there is no doubt this section confers very large powers. The place where they are to be exercised is in and under the soil and pavement of the streets and bridges, and the assumption of the *Legislature seems to me to have [433 been this: that you may take a street or a bridge—and street, by the interpretation clause, is extended so as to mean “any square, court, or alley, highway, lane, road, or thoroughfare”—that you may take a street under these meanings as being something which is dedicated to the public, and *prima facie* having nothing under it but valueless soil and materials, and that, at all events, to the extent to which a gas company might naturally have to go down into the earth they may safely be trusted to go down under a highway or thoroughfare of this description, removing the soil and reinstating it, doing as little damage as they can. If the matter had stood there, and in going down under a street the gas company had come upon an archway: possibly a question might arise whether an archway of that kind comes under the words “earth and materials,” and could be removed or interfered with. My own impression is—it is not necessary to decide it—that if the case stood on s. 6 there would be an absolute power under this section to open the soil and to lay pipes.

But s. 7 seems to me to make this case clear beyond all doubt. It is a proviso engrafted on s. 6, although it is a separate section. It provides: “That nothing herein”—that is, in the 6th section—“shall authorize or empower the undertakers to lay down or place any pipe or other works into, through, or against any building.” Now I am not considering at this moment whether the archway is a building or not. Assume it to be a building. The learned counsel argued that a building within s. 7 must mean a building upon the soil of the road. I do not know on what principle we are to put that limited construction on a word that is perfectly general in the statute. You have s. 6 authorizing you to do works under a street, *inter alia*, and you have s. 7 saying, by way of proviso, that shall not authorize you to interfere—and they use a simple word—with any building. I want to know on what principle that is not to include, as the words would naturally include, a building if there be a building under a road. It seems to me perfectly clear that there can be no principle whatever to authorize us so to limit s. 7. And I must say that reason

and common sense seem to me to go entirely with that construction. We know there are many houses which have 434] important parts of *the building under a footway or a road. But the question remains, was this in fact a building? Now the place was one or more arches. The history of those arches is not very clear. They may originally have been placed there because it was the most convenient way of supporting the road, or it may be that when the road came to be made or came to be supported, the owner of the soil may have thought it a convenient thing to have arches so that he might use them; but whether they were made mainly for the support of the road, or for the convenience of the landowner at the same time that they were supporting the road, they have been used by the landowner as stores or cellars, doors having been placed upon them, and in other respects just as you might use a building which has been constructed for the specific purpose of being used as a store. They are not the natural formation of the ground under the road; they are artificial, they are the construction of man, they are the putting together of bricks and mortar, and being used for the purpose for which they are used, I am at a loss to conceive why they are not to be included under the word building. In my opinion they clearly are buildings within the meaning of the words of the act of Parliament.

The result of that, therefore, is, that there was not parliamentary power without the consent of the owner to interfere with these buildings, and having interfered with them, the defendants exceeded their parliamentary powers, and were trespassers. The damage having been assessed at £25, for that sum the plaintiff must have judgment.

COCKBURN, C.J.: I concur in the result at which the Lord Chancellor has arrived, though not altogether upon the same grounds; for I think, on the true construction of s. 6, that what was done here by the gas company was beyond the power conferred by that section. I think the power thence derived is limited to opening and breaking up the soil and pavement of streets and bridges in the strict sense of the term; and that whatever else is referred to in respect of sewers, drains, and tunnels, must be taken as subordinate to the exercise of the power as so limited. The power being thus limited to the soil of the street or bridge, I cannot think that anything which does not properly con- 435] stitute *the soil is within the power. Suppose there were no building there, but that the question was as to the use of the soil of the street, I think it would be necessary to

consider to what depth the soil of the street can be said to extend, as the power of using the soil for the purpose of laying their pipes extends only to what can properly be called the soil of the street. But whether or not that is the right construction of s. 6, as I think it is, I agree in the view which the Lord Chancellor has expressed as to the operation of s. 7 of the statute. I think this was a building within the meaning of that section. I must altogether reject the contention of Mr. Shield that the term "building" in s. 7 has reference only to buildings that are upon the surface of, and not beneath the street. The fact pointed out by the Lord Chancellor of there being so many instances in which part of a house itself is under the street makes it monstrous to suppose that a gas company might deal with such portions of a man's house with a total disregard of the injurious consequences that might result to him. The Legislature meant that a company should divert the course of their pipes so as to avoid these parts of houses. I agree that if arches were made solely for the purpose of supporting the road—if that was their primary origin, or their sole use—it might be a question whether such arches could be held to be buildings within the meaning of s. 7, although their artificial construction by the hands of man renders them distinguishable from the soil of a street or bridge. Here in fact, these arches had apparently been used as long as the road or street had been in existence for the purposes of the owner of the soil as buildings. I think there is reason to suppose that they were originally cellars which belonged to the houses which have stood there as far back as the evidence goes, and for some time past they have been used as subsidiary to the premises of the plaintiff which adjoin. I think they were buildings as distinguishable from mere constructions to support the road, and therefore that they were buildings within s. 7, and as such within the protection of it. I agree with the Lord Chancellor that there ought to be judgment for the plaintiff to the extent of £25, which is the amount of damage occasioned by this act of the defendants.

*BRAMWELL, L.J.: I am of the same opinion. It [436 is not denied that this was a building, and not the material of the road. If the road had been taken away, it would have left nothing but a building, and it was not the less a building by reason of the road going over it. Then Mr. Shield's contention that the statute meant buildings above ground really is an impossible one. I will not attempt to add to the reasons which the Lord Chancellor has given why the

Legislature could not have meant so, but I content myself with saying it is an impossible construction, because Mr. Shield's argument is this, that s. 7 means "nothing herein contained shall authorize or empower the undertakers to lay down or place any pipe or other works into, through, or against any building" above ground. That is how he reads it. But when you look at s. 6, the only authority they have is to lay pipes underground. Therefore, it would come to this: s. 6. says you may place pipes underground, but s. 7 says you shall not place them in a building above ground. That cannot very well be. I say no more upon that. Upon the other point, I agree with the Lord Chief Justice. I will say one word, and one word only upon it, because it is not necessary for the purposes of to-day. It seems to me under this act of Parliament there is power given to the undertakers or the gas companies to acquire an easement or right of occupancy, but apparently never upon the terms of their paying for it. It is always something that is gratuitous. It seems to me that makes it almost certain that the Legislature did not mean that anything in which the landowner had a beneficial occupancy should be interfered with. What the Legislature had in view was this: the soil of a public road where such mains are generally laid is of very little value to its owner; it is no use to anybody but to the public as a road, but nevertheless if the gas company would have had to pay for a right to put their gas pipes there, the result would have been that they would have had to pay a price for that which was of no value. Therefore the Legislature enacted that the comparatively worthless ownership should be disregarded. I think that is the scheme of the act. And I think that is corroborated by the words that they may open the soil and pavement of the several streets, and may take away the materials. I 447] think *the contention that they may not only take away the materials, but may do more, viz., that they may abridge the amount of enjoyment which a man has in his cellars is an impossible contention. I think, therefore, that the judgment should be for the plaintiff for £25.

Judgment reversed, and entered for the plaintiff.

Solicitor for plaintiff: *John Tucker.*

Solicitors for defendants: *Johnson & Weatherall.*

[2 Exchequer Division, 441.]

June 18, 1877.

[IN THE COURT OF APPEAL.]

***ATKINSON v. THE NEWCASTLE AND GATESHEAD [441]
WATERWORKS COMPANY (').***Public Statutory Duty, Breach of, when Actionable—Waterworks Clauses Act, 1847—*
10 Vict. c. 17, ss. 42, 43.

The mere fact that the breach of a public statutory duty has caused damage does not vest a right of action in the person suffering the damage against the person guilty of the breach; whether the breach does or does not give such right of action must depend upon the object and language of the particular statute.

By the Waterworks Clauses Act, 1847, the undertakers are: (1) to fix and maintain fire-plugs; (2) to furnish to the town commissioners a sufficient supply of water for certain public purposes; (3) to keep their pipes to which fire-plugs are fixed at all times charged with water at a certain pressure, and to allow all persons at all times to use the same for extinguishing fire without compensation; and (4) to supply to every owner or occupier of any dwelling house, having paid or tendered the water rate, sufficient water for domestic purposes.

By s. 43 a penalty of £10 (recoverable summarily before two justices, who may award not more than half the penalty to the informer and are to give the remainder to the overseers of the parish), is imposed on the undertakers for the neglect of each of the above duties, and for the neglect of (2) and (4) they are further to forfeit to the commissioners or rate payer a penalty of 40s. a day, for each day during which such neglect continues after notice in writing of non-supply.

The plaintiff brought an action for damages against a waterworks company for not keeping their pipes charged as required by the act, whereby his premises situate within the limits of the defendants' act were burnt down:

Held (reversing the decision of the Court of Exchequer), that the statute gave no right of action to the plaintiff.

Couch v. Steel (3 E. & B., 402; 23 L. J. (Q.B.), 121) questioned.

DECLARATION: That by 26 Vict. cxxxiv (incorporating the Waterworks Clauses Act, 1847, 10 Vict. c. 17) ('), the

(') Reversing L. R., 6 Exch., 404.

(') The material sections of 10 Vict. c. 17, are:

Sect. 42: "The undertakers shall at all times keep charged with water, under such pressure as aforesaid (which by s. 35 is such a pressure as will make the water reach the top story of the highest houses within the limits), all their pipes to which fire-plugs shall be fixed unless prevented by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs, and shall allow all persons at all times to take and use such water for extinguishing fire, without making compensation for the same."

Sect. 43: "If, except when prevented as aforesaid, the undertakers neglect or refuse to fix (s. 38), maintain, or repair (s. 39) such fire-plugs, or to

furnish to the town commissioners a sufficient supply of water for the public purposes aforesaid (which by s. 37 are the cleansing of sewers, supplying of baths and wash-houses, and other public purposes not including the extinguishing of fire), upon such terms as shall have been agreed on or settled as aforesaid, or if, except as aforesaid, they neglect to keep their pipes charged under such pressure as aforesaid (s. 42), or neglect or refuse to furnish to any owner or occupier entitled under this or the special act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered (s. 53), they shall be liable to a penalty of £10, and shall also forfeit to the town commissioners, and to every person having paid or tendered the rate, the sum of 40s. for

442] defendants *were incorporated with certain powers of taking land and supplying and maintaining waterworks; that the plaintiff was the owner and occupier of a dwelling house, timber yard, and saw mills situate within the limits prescribed by the defendants' act for the supply of water by the defendants, and was under the provisions of the said act, and the Waterworks Clauses Act, 1847, entitled, for reward to be paid by him to the defendants in that behalf, to a supply of water by the defendants, and had complied with all the provisions of the said acts in order to entitle him to such supply for domestic and other purposes; that the defendants had laid down pipes near to the dwelling house, &c., of the plaintiff for the purpose of supplying water according to the said acts, and had fixed to such pipes fire-plugs; that nevertheless the defendants, neglecting their duty in that behalf, did not at all times, and especially at the time of the breaking out on the dwelling house, &c., of the plaintiff of the fire hereinafter mentioned, keep charged with water their pipes to which fire-plugs had been fixed, under such pressure as by the defendants' act and the Waterworks Clauses Act, 1847, was required, although the defendants were not prevented from so doing by frost, unusual drought, or other unavoidable cause or accident, or by the doing of necessary repairs. That, during the time the pipes, with the said fire-plugs affixed thereto, were so laid as aforesaid, a fire broke out in the timber yard and 443] saw mills of the plaintiff, and by reason of the *defendants not having charged the pipes under such pressure as aforesaid, a proper supply of water could not be procured for the purpose of extinguishing the fire, and in consequence thereof the timber yard and saw mills were burnt down, and the plaintiff was greatly damaged.

Demurrer and joinder.

The Court of Exchequer held the declaration good (') on the authority of *Couch v. Steel* (').

The defendants appealed.

C. Russell, Q.C. (*G. Bruce* and *Shield* with him), for the plaintiff ('): The fact of the imposition of a penalty, recov-

every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply."

By s. 85, the clauses of the Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), with respect to the recovery of damages and penalties are to be incorporated; and by s. 145 of 8 Vict. c. 20, penalties are recoverable by summary

proceeding before two justices, who by s. 150 may award not more than one half the penalty to the informer, and shall award the remainder to the overseers of the parish.

(¹) Law Rep., 6 Ex., 404.

(²) 3 E. & B., 402; 23 L. J. (Q.B.), 121.

(³) There being a cross appeal on another point, the plaintiff began.

erable by a common informer, for the breach of the duty, does not deprive the plaintiff, who has suffered special damage from the defendants' neglect, of his common law remedy by action for compensation. *Couch v. Steel* (') is a direct authority in favor of the plaintiff's right to maintain this action. Lord Campbell there lays it down that the "right by the common law to maintain an action on the case for special damage sustained by the breach of a public duty is not taken away by reason of the statute which creates the duty imposing a penalty recoverable by a common informer for neglect to perform it though no actual damage is sustained by any one." For the penalty given by the statute is applicable only to the public wrong, not to the private damage. And the case of *Stevens v. Jeacocke* (') is not against the plaintiff's contention, for that case is distinguishable on the ground pointed out by Lord Campbell in *Couch v. Steel* ('), that no duty was there imposed by the statute on the defendant, he was only prohibited from exercising the right of fishing to the same extent that he had it at common law.

Sir John Holker, A.G., and *Herschell*, Q.C. (*Crompton* with them), for the defendants: The remedy for the defendants' neglect to discharge the duty imposed upon them by s. 42 is confined to the recovery of the penalty, whether damage is caused by that neglect or not. The court must look at the particular act to see what *was the intention of the Legislature. The only authority for the plaintiff's contention is the case of *Couch v. Steel* ('). But the authorities there relied on in support of the decision in that case do not warrant it. That case is inconsistent with *Stevens v. Jeacocke* ('), which was improperly distinguished from it by Lord Campbell. There is no difference between a duty not to do a thing, and a duty to do a thing as far as regards their character as duties. Yet that was the only distinction drawn by the court.

G. Bruce, in reply: Here the duty, for the breach of which the plaintiff sues, was not a duty created for the benefit of the public generally, but only of persons living in a particular district, only those persons whose houses are near enough to the pipes in question to derive advantage from the water in such pipes in the event of fire. But where a statute imposes a duty for the benefit of a class of persons, any member of that class who is injured by a breach of such duty must have a remedy by action, if there is no

(') 8 E. & B., 402; 23 L. J. (Q.B.), 121.

(') 11 Q. B., 731; 17 L. J. (Q.B.), 163.

penalty given specially to him, otherwise the statute would be a dead letter. Here there is no penalty given to the person injured, therefore the action lies. There is a remedy given by the act no doubt, but not a remedy to the person aggrieved in the sense of compensation for injury.

LORD CAIRNS, L.C.: In considering the sufficiency of this declaration, we may, as I pointed out in the course of the argument, reject at once all that part of it which relates to the supply of water for reward, for the breach alleged is not dependent on the payment of money. It is a breach of a duty to keep certain pipes, to which fire-plugs are fixed, charged with water at a certain pressure, a duty which is not made, by the act creating it, to depend in any way upon the payment of money by anybody. That duty of so keeping the pipes charged arises under s. 42 of the Waterworks Clauses Act, 1847, by which it is enacted that "the undertakers shall at all times keep charged with water, under such pressure as aforesaid (which by s. 35 is such pressure as will make the water reach the top story of the highest house within the limits), all their pipes to which fire-plugs 445] shall be fixed, . . . and shall allow all *persons at all times to take and use such water for extinguishing fire without making compensation for the same." Now in my judgment the general scheme of these waterworks clauses, and of any act in which they are incorporated, would appear to be this: A waterworks company, proposing to supply water to a town, apply to Parliament for powers to take certain springs and land, and to charge rates for the supply of water, in consideration of which powers being granted them they enter into certain obligations. Besides general obligations to supply the town commissioners with water for public purposes, they enter into certain special obligations as to fire-plugs, viz., to keep the pipes connected with those plugs charged with water at a certain pressure, and to allow all persons—not any particular persons, or owners of particular houses, but *all* persons—at all times to take water for the purpose of extinguishing fire without making compensation for it. The object for which the water is in such case to be used is a public object and to effect that object the company are willing to accept the obligation to allow any person to take any quantity of water gratuitously, and further to keep the pipes from which that water is to be taken charged at such a pressure that the water so taken may be most effectively employed.

That this creates a statutory duty no one can dispute, but the question is whether the creation of that duty gives a

right of action for damages to an individual who, like the plaintiff, can aver that he had a house situate within the company's limits and near to one of their fire-plugs, that a fire broke out, that the pipes connected with the plug were not charged at the pressure required by the section, and that in consequence his house was burnt down. Now, *à priori*, it certainly appears a startling thing to say that a company undertaking to supply a town like Newcastle with water, would not only be willing to be put under this parliamentary duty to supply gratuitously for the purpose of extinguishing fire an unlimited quantity of water at a certain pressure, and to be subjected to penalties for the non-performance of that duty, but would further be willing in their contract with Parliament to subject themselves to the liability to actions by any number of householders who might happen to have their houses burnt down in consequence; and it is, *à priori*, equally improbable that Parliament *would [446 think it a necessary or reasonable bargain to make. In the one case the undertakers would know beforehand what they had to meet as the consequence of their neglect, they would come under definite penalties; in the other they would virtually become gratuitous insurers of the safety from fire, so far as water is capable of producing that safety, of all the houses within the district over which their powers were to extend.

It is, however, necessary to look at the 43d section, which imposes the penalty for the breach of the duty in question. That section deals with four classes of neglect, the neglect to fix, maintain, or repair fire-plugs, the neglect to furnish the town commissioners with a sufficient supply of water for public purposes, the neglect to keep the pipes charged under the required pressure, and the neglect to furnish any owner or occupier with the supply of water to which he is entitled. For each of those four classes of neglect the company is visited with a penalty of £10. And in two of them, the second and fourth, the company is also to forfeit to the commissioners or the rate payer aggrieved a further penalty of 40s. a day for every day during which the neglect continues after notice in writing given to the company. Now, why is it that in some cases there is a penalty which is to go into the pocket of the persons injured, and not in the case of neglecting to keep the pipes fixed to the fire-plugs charged under the proper pressure? The reason is obvious. In the former cases it is convenient to give a penalty to the individual, in the latter case it is not. In the cases of the town commissioners and the owners or occupiers asking for and not

getting their proper supply of water, you have a person or persons known and determined to whom the penalty may be given, but in the case of neglect to keep the pipes properly charged there is no particular person whom you can single out beforehand, and say that in the event of a breach, he is to be entitled to the penalty. In that case then the only guarantee taken by Parliament for the fulfilment of the obligation, an obligation which has the appearance of being imposed for the benefit of the public, is what I may term the public penalty of £10. Apart, then, from authority, I should say, without hesitation, that it was no part of the scheme of this act to create any duty which was to become the subject of an action as the suit of individuals, to create any right in individuals with a power of enforcing that right 447] by *action; but that its scheme was, having laid down certain duties, to provide guarantees for the due fulfilment of them, and where convenient to give the penalties, or some of them to the persons injured, but, where not convenient so to do, there simply to impose public penalties, not by way of compensation, but as a security to the public for the due performance of the duty. To split up the 43d section, and to say that in those cases in which a penalty is to go into the pocket of the individual injured there is to be no right of action, but that where no penalty is so given to the individual there is to be a right of action, is to violate the ordinary rule of construction. There being here in a certain number of cases a penalty which the plaintiff himself admits excludes the right of action, the conclusion is irresistible that in the remaining cases also in the same section the Legislature intended to give no right of action.

Now that would have been my opinion apart from authority. Is there then any authority which compels me to depart from that opinion? The only case which was cited to us in support of the plaintiff's contention was that of *Couch v. Steel* ('). There a seaman of a merchant ship sued to recover damages for injuries sustained by him by reason of the omission of the defendant, a shipowner, to provide proper medicines for the ship's company. The declaration in that case was not framed upon any act of Parliament, but on the argument of the demurrer one of the Merchant Shipping Acts was referred to as creating a duty in the shipowner to provide certain medicines for the benefit of the crew, and the case was put by counsel very much as if there had been a parliamentary obligation to provide a greatcoat or some specific chattel for each particular member of the

(') 8 E. & B., 402; 23 L. J. (Q.B.), 121.

ship's crew. The same act which created the duty to provide the medicines imposed a penalty recoverable by a common informer for the omission to perform that duty; but it was there held that, notwithstanding the imposition of the penalty, an action lay at the suit of any one of the crew suffering special damage from such omission. With regard to that case, and the effect of that particular act, I will say this, that if the matter were brought before this court for review I should like to take time to consider *whether, [448 with reference to that particular act, that case was rightly decided. I will not go further than that, for it is unnecessary here to enter into that question, the act of Parliament under which the present action is brought being of a widely different character, and one which is open to observations which would not apply to the Merchants Shipping Act which was before the court in *Couch v. Steel* ('). But I must venture, with great respect to the learned judges who decided that case, and particularly to Lord Campbell, to express grave doubts whether the authorities cited by Lord Campbell (') justify the broad general proposition that appears to have been there laid down,—that, wherever a statutory duty is created, any person, who can show that he has sustained injuries from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed. I cannot but think that that must, to a great extent, depend on the purview of the Legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the act with which the court have to deal is not an act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works. The case of *Couch v. Steel* ('), therefore, is no authority to regulate our decision in the present case. I am of opinion, therefore, that the declaration discloses no cause of action, and that the judgment of the Court of Exchequer must be reversed.

COCKBURN, C.J.: I am of the same opinion. Notwithstanding the great respect that I entertain for the judges who decided the case of *Couch v. Steel* ('), I must say that I fully concur with the Lord Chancellor in thinking, that the question, whether that case was rightly decided, is one which is open to very grave doubts. That question, however, is one which it is unnecessary to entertain here, for the

(') 3 E. & B., 402; 23 L. J. (Q.B.),

(') 3 E. & B., at p. 411; 23 L. J.

(Q.B.), at p. 125.

present case is clearly distinguishable. The act of Parliament on which that case turned was a public general act applicable to all the Queen's subjects; here we are dealing with certain obligations imposed by the Legislature upon 449] *a private company, as the conditions upon which Parliament granted them the powers under which they carried out their undertaking; and I think that such an act of Parliament as this is liable to a much more limited and strict interpretation than that which can be put upon one which is applicable to all the subjects of the realm. I entirely agree with the Lord Chancellor in the conclusion at which he has arrived, that the particular act which we have now before us does not by implication give to persons, who may be injured by the breach of the duties thereby imposed, any remedy over and above those which it gives in express terms. If, therefore, any person is injured by a breach of such duty, he must have recourse to the statutory remedy, and cannot maintain an action for damages.

BRETT, L.J.: On the true construction of this statute it is plainly the intention of the Legislature that the only remedy for such a breach of duty as the present should be the recovery of the penalty. I am, therefore, of opinion, that the demurrer must be allowed. It is unnecessary to determine here whether *Couch v. Steel* (') was properly decided upon the particular act under which the action in that case was brought; I am, however, bound to say that I entertain the strongest doubt whether the broad rule there enunciated can be maintained, the rule, that is to say, that, where a new duty is created by statute, and a penalty is imposed for its breach, which penalty is to go to the person injured by such breach, the penalty, however small and inadequate a compensation it may be, is in such a case to be regarded as indicating an intention on the part of the Legislature that there should be no action by such person for damages, but that, where a similar duty is created, and a similar penalty imposed which is not to go to the person injured, then the intention is that he is to have a right of action. I do not think that that proposition can be supported.

Judgment reversed.

Solicitors for plaintiff: *Walters & Gush*, for Chartres & Youll, Newcastle-upon-Tyne.

Solicitors for defendants: *Williamson, Hill & Co.*

(') 3 E. & B., 402; 23 L. J. (Q.B.), 121.

It is somewhat doubtful whether the principal case can be upheld within the doctrines laid down by the American courts. Had injury to the plaintiff resulted *directly*, as by the breaking of a water pipe and flooding of plaintiff's premises, from a failure by the water company to comply with a duty imposed upon it by statute, an action could have been maintained. If the principal case could be sustained here it would be upon the doctrine that plaintiff's damages were too remote, and were not the *direct result* of a failure by the water company to discharge the statutory duty. As one of the objects of the sovereign power was to provide water to be used at fires, it is difficult to see why the injury was not one of those intended to be provided against by the formation of the water company, and why it, having accepted the charter, was not liable for a failure to discharge the duty it voluntarily assumed in consideration of its charter.

The general rule is, that where one *contracts* for the doing of an act in the doing of which another is interested, such third person may maintain an action, founded upon the contract duty, against the person contracting to do the act, if such third person be injured by the failure to perform it: *Coster v. Mayor*, 43 N. Y., 899, 411-412; *Van Schaick v. Third Av., etc.*, 38 N. Y., 346; *Lawrence v. Fox*, 20 N. Y., 268.

See 17 Eng. Rep., 765 note.

And that whenever an individual or a corporation created by the sovereign power, has become bound by contract or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such contract duty, not only to the public, but to a private action at the suit of any person injured by such neglect: *West v. Trustees, etc.*, 16 N. Y., 163 note; *Robinson v. Chamberlain*, 34 N. Y.,

389; *Connors v. Adams*, 13 Hun, 427; *Adsit v. Brady*, 4 Hill, 630; *French v. Donaldson*, 5 Lans., 293; *Conway v. Gale*, 5 Lans., 344; *Johnson v. Belden*, 47 N. Y., 130, affirming 2 Lansing, 438; *Brooklyn v. Brooklyn R. R.*, 47 N. Y., 486; *Fulton, etc., v. Baldwin*, 37 N. Y., 648; *Little v. Banks, Osborn, J.*, Albany Evening Times, April 8, 1879.

As any person, for whose benefit a contract was expressly made, can sue for a breach thereof, though not himself a party to the contract, it follows that, where a contract is made by the state for the benefit of a class of persons, any one of that class specially injured by a breach of the contract may sue thereon. So, if a specific duty is imposed upon any person by law or by a legal authority, an action may be sustained against him by any person who is specifically injured by his failure to perform that duty. Both classes of actions are regarded as actions in tort for negligence, although the former class would seem to be technically founded on contract: *Shearman & Redf. Neg.* (2d ed.), § 54 a; *City of Brooklyn v. Brooklyn R. R.*, 47 N. Y., 475.

This liability extends to injuries arising from neglect to perform the duty enjoined, or from negligence or unskillfulness in its performance: *Wrightman v. Washington*, 1 Black, 89; *Lyme Regis v. Henley*, 1 Bingham, N. C., 27 Eng. C. L. R., 222, 240, House of Lords.

The obligations of a canal company do not exist in favor only of those who navigate its canal, or for whom it transports persons or property. It owes a duty to the public at large to see that its canal, locks, bridges and other property are so constructed, maintained, and managed, as not to cause injuries to others: *Shearman & Redf. Neg.* (2d ed.), § 258.

[2 Exchequer Division, 450.]

June 28, 1877.

450] *In the Matter of an Application by TOOMER and Others v. THE LONDON, CHATHAM AND DOVER RAILWAY COMPANY and THE SOUTH EASTERN RAILWAY COMPANY.

Railway Commissioners—Jurisdiction of, to make Orders requiring two Companies to act jointly—Order for Penalties—Prohibition—Regulation of Railways Act, 1873 (86 & 87 Vict. c. 48), ss. 6, 11, 26—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), ss. 2, 3.

The Railway Commissioners, under 86 & 87 Vict. c. 48, made an order requiring the C. and the S. E. Railway Companies to make arrangements and to afford facilities for the transference of traffic from the line of one company to the other; to arrange the arrivals of their trains at a junction in a particular manner, and directing the C. Company to run trains over a disused branch line; and, upon non-compliance with the order, made a further order imposing penalties upon both companies for their disobedience:

Held, that the first order was invalid, and that a prohibition must be granted to restrain the commissioners from enforcing it; for, assuming that they had jurisdiction to require each company separately to give facilities according to its powers, they were not entitled to order two companies to act jointly in doing what neither could do separately.

Quære, whether, if the first order had been valid, the commissioners had, under s. 6, jurisdiction to impose penalties for non-compliance with it.

[2 Exchequer Division, 459.]

July 5, 1877.

459] *BISSICKS v. THE BATH COLLIERY COMPANY, LIMITED. *Ex parte* BISSICKS.

Sheriff—Levy under fi. fa.—Poundage and Fee—29 Eliz. c. 4—1 Vict. c. 55.

A sheriff's officer in the execution of a warrant of *fi. fa.* went with another man to the debtor's house, showed him the warrant, and demanded payment, and told him that in default of payment the man must remain in possession and further proceedings be taken. The debtor then paid the sum demanded in the warrant, which included poundage and officer's fee:

Held, that there had been in substance a levy, and that the sheriff was entitled to poundage and fee, though there had been no sale.

Nash v. Dickinson (Law Rep., 2 C. P., 252), and *Roe v. Hammond* (*ante*, page 297), not followed.

In this case judgment had been given against the plaintiff with costs, which were taxed at £23 19s. 2d. A writ of *fi. fa.* having been delivered to the sheriff of Bristol, his officer, accompanied by another man, proceeded with the warrant to the plaintiff's shop, where he found the plaintiff and told him he had a warrant to execute a writ of *fi. fa.* for £28 7s. 2d. The plaintiff being then engaged in

serving a customer the officer waited about a quarter of an hour till the plaintiff was at liberty, and then explained the nature of the warrant, and read over the principal parts to him. The plaintiff took the various items down in writing, and the officer then told him that he required immediate payment, otherwise further proceedings would be taken and the man must remain in possession. The plaintiff then asked the officer into his counting-house, took out a cash box and paid him the £28 7s. 2d., which was made up as follows: taxed costs, £23 19s. 2d.; costs of execution, £1 15s.; interest, 1s.; poundage, £1 6s.; levy fees, £1 6s.

An order having been obtained calling on the sheriff to show cause why he should not return the £2 12s. illegally received by him for poundage and fees,

M. Kellar, for the sheriff, contended that he was entitled to both poundage and fees, since what was done amounted to a levy, or at all events to a seizure, which was sufficient. He referred to 29 Eliz. c. 4, by which poundage is granted; 43 Geo. 3, c. 46, s. 5; Common Law Procedure Act, 1852, s. 123; *Rex v. Jetherell* (1); *Graham v. Grill* (2); *Rawstorne v. Wilkinson* (3); *Colls v. Coates* (4); *Miles v. Harris* (5), per Willes, J.; *Rex v. Robinson* (6); *Hutchins v. Scott* (7); *Masters v. Lowther* (8); and to *Nash v. Dickinson* (9), which was distinguishable since it did not appear there were any goods to seize, and the money was paid under protest.

F. M. White, Q.C., for the plaintiff: *Miles v. Harris* (5) decided that the sheriff is not entitled to poundage unless he has sold, though there may have been an actual seizure—per Erle, C.J., and Willes, J. (10). Here there was not even a seizure. *Nash v. Dickinson* (9) is a direct [461] authority that under circumstances like the present the sheriff is not entitled to poundage. There is no appreciable distinction, and that case must be overruled if the sheriff is to be held entitled. In *Roe v. Hammond* (11) it was held that the sheriff who has seized but not sold is not entitled to poundage, the court following an anonymous case cited from Lofft, where it was said in the King's Bench, "It seems on inquiry into the practice the sheriff cannot have poundage till the goods are sold." As to the sheriff's fee of

(1) Parker, 177.

(2) 2 M. & S., 298.

(3) 4 M. & S., 256.

(4) 11 A. & E., 826; 9 L. J. (N.S.), (Q.B.), 232.

(5) 12 C. B. (N.S.), at p. 559; 81 L. J. (C.P.), 361.

(6) 2 C. M. & R., 334.

(7) 2 M. & W., 809.

(8) 11 C. B., 948; 21 L. J. (C.P.), 130.

(9) Law Rep., 2 C. P., 252.

(10) 31 L. J. (C.P.), at p. 362.

(11) 2 C. P. D., 305.

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£1 1s. which is granted under 1 Vict. c. 55, it is not due till the warrant is executed. In the Table of Fees (2 Ch. Arch. Pr., 1777, 12th ed.) it is expressed, "To the bailiffs for executing warrants on *fl. fa.* £1 1s." In the form given for writs of *fl. fa.* in the Judicature Act, 1875, Appendix F, 1, the sheriff is commanded that of the goods and chattels of — he "cause to be *made* the sum of £—." In *Masters v. Lowther* (') Jervis, C.J., said that where the goods are released without execution being executed no poundage is payable. The writ is not wholly executed till the goods are sold and the proceeds handed over: *Harri-son v. Paynter* (*).

COCKBURN, C.J.: The question is whether the writ of *fl. fa.* was executed. If it was the sheriff is entitled to poundage and fees; if it was not executed he is not entitled. The case of *Nash v. Dickinson* (*), though the facts are not precisely the same, is substantially a decision upon this point. But in matters of practice the decisions of one court are not binding upon the others, unless the practice has become so settled that it ought not to be shaken. In my opinion, it is enough if the sheriff's officer goes down to the premises with the warrant and gets payment. He can only receive payment by virtue of the warrant, which is his authority, and the debtor can make a valid payment only under the warrant; and if the debtor in order to avoid the inconvenience of a levy and sale prefers to pay the money, I think the sheriff's officer is not only authorized but bound to accept it. But is he therefore to lose his remuneration? 462] It is a great *relief to the debtor to have the matter settled as early as possible. If we were to say that it is only by a levy and sale that the officer earns his remuneration, then in every instance the officer would have to insist on the whole performance being gone through, and that would cause great inconvenience.

We must look to see if the writ has been *virtually* executed. The officer comes and says, "I have a warrant to seize your goods for a certain sum, which must be paid or further proceedings will be taken." They go through the items together, and the debtor voluntarily hands over the money to the officer, being under an obligation to him for his courtesy in giving as little trouble as possible, and then the debtor dishonorably turns round and refuses to pay his fees. I think therefore that the sheriff is entitled to these sums, and that the decision of *Nash v. Dickinson* (*) was

(') 11 C. B., at p. 953.

(*) 6 M. & W., 387; 9 L. J. (N.S.), Ex., 169.

(*) Law Rep., 2 C. P., 252.

on insufficient grounds. I say nothing about *Roe v. Hammond* (') because that decision appears to have been founded on an anonymous case in Lofft's Reports, which is not sufficient to support it.

CLEASBY, B.: It is of no use attempting to define a levy, but I think in this case there was in substance an actual levy, and if so, the sheriff is entitled to his poundage and fees.

Solicitors for plaintiff: *Mead & Daubeney*.

Solicitors for sheriff: *Guscott, Wadham & Daw*, for Wadham, Chilton & Green—Armytage, Bristol.

(') 2 C. P. D., 300.

See *Roe v. Hammond*, *ante*, 297.

The sheriff is entitled to poundage on a *ca. sa.* on serving the execution; and he has a right to call on the attorney for such poundage, without resort to the party: *Adams v. Hopkins*, 5 Johns. Rep., 253.

Where property is levied upon by a sheriff by virtue of an execution, and the judgment is subsequently satisfied by an arrangement between the parties to the process, the sheriff is entitled to his poundage, notwithstanding that the property levied upon was covered with liens previous to the judgment to an amount exceeding its value: *Parsons v. Bowdoin*, 17 Wend., 14.

Where several executions are issued at the same time to different counties upon the same judgment, and satisfaction is made upon one execution, the sheriff of every other county to whom an execution is issued, and who has levied upon property sufficient to satisfy the same, is entitled to *poundage*, which he may demand from the plaintiff; but he cannot levy it of the property of the defendant: *Bolton v. Lawrence*, 9 Wend., 436; *Hildreth v. Ellice*, 1 Caines, 192.

Where a defendant has been taken under a *ca. sa.*, and discharged from custody on the ground that no previous *fi. fa.* had been issued on the judgment (there being special bail in the action), the sheriff is, notwithstanding, entitled to poundage; as he has incurred the risk of being made liable for an escape, in an action for which he could not have availed himself of the irregularity as a defence.

And it makes no difference that the defendant, after his discharge, con-

fessed a new judgment to the plaintiff for the amount of the former judgment, on which satisfaction was entered, and that a *ca. sa.* having been regularly issued on the second judgment, the sheriff had been paid his poundage thereon: *Scott v. Shaw*, 13 Johns., 378.

Where a levy had been made by a sheriff under a writ of *fi. ri. facias*, but before a sale the writ and all proceedings thereon were set aside: Held that the sheriff was not entitled to poundage: *Walker v. Fairfield*, 8 U. C. C. Pl. Rep., 95.

The contrary has been, as before shown, and we think correctly, held in New York. It is there held that the sheriff is not affected by an irregularity in issuing the process and may recover, though it were irregular and be set aside therefor: *Scott v. Shaw*, 13 Johns., 378.

Otherwise if the sheriff's own proceedings were irregular, as where he arrested a party privileged from arrest: *Wragg v. Swart*, 10 Johns., 93.

A sheriff is only entitled to poundage upon the debt really due; therefore if a writ be, by mistake, indorsed for a larger sum than is due, and the sheriff executes it for that amount, and the mistake is afterwards corrected, the sheriff's claim to poundage must be reduced accordingly: *Evans v. Mavero*, Hurl. & Walms., 153, 7 Mees. & Welsb., 463.

But a sheriff is not entitled to poundage upon an execution unless he has levied upon property which he could sell thereon, and out of which he could make the execution: *Calhoun v. Lee*, 29 How. Pr., 1.

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And this, although the defendant in the execution has property within the sheriff's bailiwick, out of which the sheriff might have made the execution: *Leming v. Hagerman*, 5 U. C. K. B. (O.S.), 38, 42.

A sheriff has no right to sell the property of a defendant in an execution for the purpose of collecting his fees, after notice of satisfaction of the judgment; he must look to the plaintiff or his attorney for them. It seems, however, that a sheriff would be permitted to sell in case of collusion between the parties, and where the plaintiff and his attorney are irresponsible: *Jackson v. Anderson*, 4 Wend., 474.

The plaintiff recovered a judgment against defendant, and an execution thereon was issued by one of his attorneys and a levy made. Subsequently the defendant gave the requisite undertaking to stay execution, and appealed to the general term, where the judgment was affirmed, and to the Court of Appeals, where the appeal was dismissed. Thereafter defendant paid to the plaintiff's other attorney, who did not know of the issue of the execution, what he claimed was due on the judgment, and it was satisfied of record by him. Subsequently the plaintiff moved to have the satisfaction cancelled and set aside, to enable the sheriff to collect his poundage and fees, which was granted. Held that it was error so to do, as there was no offer to return to defendant the amount he had paid to procure the satisfaction: *Benson v. Perry*, 17 Hun, 16, affirmed by Court of Appeals, June 8, 1879.

In New York it has been held that the sheriff, who has taken property by virtue of a warrant of attachment, which is a *means process* issued under the Code, is not entitled to poundage in case of a subsequent settlement of plaintiff's claim before any sale of the property by the sheriff.

Section 243 of the Code, as amended in 1865, only allows poundage in case of a sale by virtue of the attachment before judgment; and then only in case a settlement has been had or a judgment recovered and collected, in whole or in part, in which case poundage is to be estimated on the amount collected, or "the amount at which settlement is made." *German American Bank v. Morris Run, etc.*, 68 N. Y., 585.

This case went upon the theory that, as the attachment was *means process* if poundage were collectible without sale, it might be twice collected, once for levy on the *means process* and again on sale under final process.

It is now provided by the Code of that state (§ 243) that on attachments no poundage or other compensation shall be allowed to the sheriff (except his fee of fifty cents for making the levy, and such compensation for his trouble and expense in taking possession of and preserving the property as shall be fixed by the officer issuing the attachment), unless a settlement shall be had or a judgment shall be recovered and collected, in whole or in part, in the action in which the attachment in this title referred to shall have issued. And where a judgment shall have been recovered and collected in part only, the amount of his poundage shall not be estimated upon any sum greater than the sum collected upon such judgment. And where a settlement shall be had, the amount of his poundage shall not be estimated upon any sum greater than the amount at which said settlement is made.

The poundage and fees allowed by statute to a sheriff upon an execution are in full compensation for his services and expenses in executing the writ.

He is not entitled to charge for keeping and watching the property levied on, for boxing and removing the same, for storage, for cataloguing or other preparations for sale, or for auctioneer's fees; nor can he charge for premiums paid for insurance, or for expenses by reason of an adverse claim to the property.

The relation of a sheriff to an execution debtor is not analogous to that of a servant to his master.

As to whether, when expenses are incurred by the sheriff at the request of and upon the promise to repay of one of the parties and for his benefit or convenience, he can recover the same of such party, *quere*?

Whether in case he levy upon beasts he can charge his expenditures for food, shelter and care for them, *quere*? The authorities as to the fees chargeable by a sheriff, and as to charges by officers for the performance of duties imposed upon them as such, collated:

Croft et al. v. Brandt, 58 New York, 106.

If the sheriff does anything beyond his official duty, at the instance of the defendant in the execution, he is entitled to remuneration beyond his poundage, by the defendant; but not if it is any act prohibited by law, or a violation of his duty. Nor can he charge the expense of selling the goods levied on, at auction, because he is bound to sell them himself. Yet, if an auctioneer be employed at the request of the plaintiff or the defendant, or any other party interested in having the property bring the largest price, such party must pay the expense. If the auctioneer were employed at the request of the defendant, his charges might be deducted and the balance indorsed on the execution, unless plaintiff objects. If on request of plaintiff only, the sheriff may retain the charges but must add the amount so retained to the amount paid to plaintiff, and indorse both sums as made upon the execution: *Watson on Sheriffs*, 80; *Woodgate v. Knatchbull*, 2 Term R., 157; *Croft v. Brandt*, 46 How., 481, 486, affirmed 47 How., 263, 5 Daly, 124, 58 New York, 106.

In the case of *Charles C. Sewall v. Hugh G. Frazer and others*, MCADAM, J., in the Marine Court of the city of New York, decided at special term, March 11, 1878, an auctioneer was employed by the sheriff with the approbation and consent of one of the plaintiffs, the sheriff paid the auctioneer's charge, and paid to the plaintiffs the amount collected less his fees and the auctioneer's charges. Plaintiffs moved to compel the sheriff to pay them the amount of auctioneer's charges retained, claiming he had no right to retain the amount so paid. The court held that as between the plaintiffs and the sheriff, the sheriff had a right so to do, saying:

"The proofs satisfy me, that the sale by the sheriff was well conducted, and that the articles sold realized good prices. It seems to me that the auctioneer was instrumental in bringing about this result. He seems to have advertised extensively by handbills and otherwise. Mr. Sewall, one of the plaintiffs, attended the sale, and knew that an auctioneer had been employed and was conducting it. Although Mr.

Sewall swears that he never authorized the employment of the auctioneer, the proofs satisfy me that he acquiesced in the employment and with knowledge approved of it, and this ratification is equivalent to an original authority under such circumstances. I think that the auctioneer's fees and expenses, which seem reasonable, are allowable under *Croft v. Brandt*, 46 How. Pr., 485; *Crocker on Sheriffs*, 2d ed., § 1162. The sheriff is a public officer, and when he acts in good faith ought to receive every reasonable protection. As between the sheriff and the plaintiffs (who knowingly received the benefit of the auctioneer's services) the latter and not the former ought to bear the expense. The bill as presented will be taxed. No costs upon this motion."

_____, for plaintiffs.

Erastus New, for Wemple, Sheriff.

Upon an attachment issued in this action, the sheriff seized certain property; by consent of the parties interested an order was obtained providing that the sheriff should proceed to sell by an auctioneer named, "and hold the proceeds thereof in the same manner as the property sold, subject to the existing rights of all parties therein." In pursuance of the order the sheriff sold and rendered his account, which was settled save as to items charged for auctioneer's fees, which were objected to as excessive. Held, that an order was proper taxing the items and requiring the sheriff to pay over the difference between the amount so allowed on taxation and that retained, although the money did not actually come into his hands; that it was to be presumed that he assented to the order naming the auctioneer, as neither the court nor the parties could compel him to employ an auctioneer or could name one whom he should employ without his consent; that the auctioneer was his agent; and for moneys coming into the hands of such agent he was responsible; and that this was a proper case for taxation under the provisions of the statute on that subject (2 R. S., 652, § 1).

Also held, that there having been no agreement for the compensation of the auctioneer, the sheriff had no right to allow beyond the two and one-half per cent. fixed by statute (1 R. S., 532,

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§ 23): Griffin et al. v. Helmbold, 72 N. Y. R., 487.

Where a deputy sheriff levies upon the goods of the judgment debtor, and the latter, in order to prevent the closing of his store, agrees that a keeper shall be employed, and that he will pay for his services, such agreement is, if in all respects just and fair, a valid one, and capable of being enforced by the sheriff. The words "by color of his office," in the act prohibiting the taking of security by the sheriff, includes only such acts as are evilly done by the countenance of an officer, and necessarily imply that the act is unlawful and unauthorized, and that the legal right to take the security is a mere color or pretence: Murtagh v. Conner, 15 Hun, 488.

Where a satisfaction of a judgment has been entered it cannot be treated as void, even though fraudulently obtained, and an execution issued upon the judgment until a vacatur of the satisfaction: Ackerman v. Ackerman, 14 Abb. Pr., 229; People v. Lansing, 3 Abb. Dec., 533.

See Ross v. Hicks, 11 Barb., 481; Freeman on Executions, § 445.

Where, however, a satisfaction was delivered on condition, but entered of record without compliance, it was held that although the proper and regular course was to move to take the satisfaction piece off the files and cancel the entry of satisfaction and restore the docket before issuing execution, yet the plaintiff might disregard the satisfaction and issue execution upon his judgment as unsatisfied: Anderson v. Nicholas, 4 Robertson, 630; Crosby v. Wood, 6 N. Y., 369; Hale v. Morgan, 68 Ill., 244; Freeman on Executions, § 445.

See also Slocum v. Freeman, 2 Trans. App., 303, 6 Abb. Pr., N.S., 443; Ward v. Beebe, 17 Abb. Pr., 1.

So on a forged satisfaction piece: Louder v. Remsen, 7 Wend., 35.

See, however, Costello v. Mead, 55 How. Pr., 856.

Though it seems if satisfaction be actually entered, a *bona fide* purchaser or mortgagee, while the satisfaction remains of record, would be protected: Crosby v. Wood, 6 N. Y., 369; Beebe v. Banks, 1 Johns., 529.

The court may, however, on a motion, proceed in a summary way, by

reference, or otherwise, and vacate the satisfaction without the bringing of an action to set it aside: Ackerman v. Ackerman, 14 Abb. Pr., 229, 232 and cases cited; Freeman on Executions, §§ 53-4, 352, 361.

English: Matter of Tresidder, L. R., 1 Chy. App., 21.

New Jersey: Keogh v. Delaney, 40 N. J. Law, 97.

New York: Wardell v. Eden, 2 Johns. Cas., 121; Id., 258; Ferris v. Crawford, 2 Denio, 595; Suydam v. Holden, Seld. Notes, Oct. 1853, p. 16, p. 170, 2d ed.; Renney v. Second Av. R. R., 18 N. Y., 368; Ackerman v. Ackerman, 14 Abb. Pr., 229.

See McGregor v. Comstock, 19 N. Y., 581, 1 Burr. Pr., 318; Field v. Paulding, 3 Abb. Pr., 139; Teman v. Leland, 6 Hill, 237.

When the sheriff improperly returns an execution *nulla bona*, the court may order such return to be cancelled and the execution to be taken from the files of the court and returned to the sheriff, to the end that he may proceed and sell real estate by virtue of it: Flanagan v. Tinin, 53 Barb., 587, 35 How., 130; Barker v. Binniger, 14 N. Y., 270; People v. Ames, 35 N. Y., 482, 484; James v. Gurley, 48 N. Y., 163.

The case of Flanagan v. Tinin was not affected on this point by the case of Wallace v. Swinton, 64 N. Y., 188.

A judgment debtor may apply to the court by motion to have a judgment satisfied and cancelled of record: Dwight v. St. John, 25 N. Y., 203; Ward v. Beebe, 17 Abb. Pr., 1.

See Wood v. Currey, 49 Cal., 359.

Only a party to the record, or a person having some legal or equitable interest in the cancellation of a judgment, is entitled to apply to the court in which it has been recovered to vacate or order it satisfied of record, and such application must be founded on recognized legal or equitable grounds: Matter of Beers, 5 Rob., 643.

If a judgment be a lien upon the property of a third person, all parties interested in such judgment or its continuance must be brought before the court by action or by notice of the application, whether the object be to vacate the judgment or relieve such property from its lien: Matter of Beers, 5 Rob., 643.

See also Wallace v. Swinton, 64

N. Y., 188; Beebe v. Banks, 1 Johns., 529; Keogh v. Delaney, 40 N. J. Law R., 97; Etzler v. Evans, 61 Ind., 56.

An action will lie to have a satisfaction of a judgment or mortgage cancelled of record, as having been fraudulently or improperly entered: Slocum v. Freeman, 2 Trans. App., 303, 6 Abb., N.S., 443; Bensen v. Perry, 17 Hun, 16, affirmed by Court Appeals, June 8, 1879; Romain v. Gurth, 8 Hun, 214; Johnson v. Cram, 40 Barb., 78; Lambert v. Leland, 2 Sweeney, 218; Burnstine v. Ormes, 2 Wash. Law Reporter, 337, 2 McArthur, 219; Mandeville v. Reynolds, 68 N. Y., 528; Eyre v. Burmerster, 10 H. L. Cas., 90; Mays v. Wherry, 8 Tenn. Chy., 80.

See Hoopock v. Ramsey, 26 N. J. Eq., 417; Mandeville v. Reynolds, 68 N. Y., 528.

And in some cases this course is preferable to proceedings by motion: Bensen v. Perry, 17 Hun, 16, affirmed by Court Appeals, June 8, 1879; Romain v. Gurth, 8 Hun, 214; Martin v. Hawks, 15 Johns., 405; Teman v. Leland, 6 Hill, 237; Eyre v. Burmerster, 10 H. L. Cas., 90; Costello v. Meade, 55 How. Pr., 356; Mays v. Wherry, 8 Tenn. Chy., 80.

See Dwight v. St. John, 25 N. Y., 203.

A bill will lie to restrain the enforcement of a judgment because paid: Wood v. Currey, 49 Cal., 359.

The judgment creditor may test the validity of a satisfaction of the judgment—as by showing that property sold did not belong to the defendant—by a suit thereon: Piper v. Elwood, 4 Den., 165; Mandeville v. Reynolds, 68 N. Y., 528.

Though after a constable has made return to a justice's execution *he* cannot alter it: Ross v. Hicks, 11 Barb., 481.

But see as to a sheriff, on an execution from a court of record, as between the plaintiff in the execution and the sheriff: James v. Gurley, 48 N. Y., 163.

As to how far a *levy* alone satisfies a judgment, see Freeman on Executions, § 445; Rorer on Judicial Sales, §§ 1079, 1108; Heebner v. Townsend, 8 Abb., 234; Matter of Lawrence, 4 Cow., 417; Voorhees v. Gros, 8 How. Pr. Rep., 262; Denvrey v. Fox, 22 Barb., 523

and cases cited; Peck v. Tiffany, 2 N. Y., 451; Waddell v. Elmendorf, 5 Den., 447; McBride v. Farmers, etc., 23 Barb., 476, said to have been affirmed, 24 How., 611; but this probably refers to S. C., 26 N. Y., 450, which we cannot determine to be an affirmation of the case in 23 Barb., 476.

A judgment creditor may maintain an action to obtain the cancellation of prior judgments which are apparent liens on the lands of the judgment debtor, but which he alleges to have been paid: Shaw v. Dwight, 27 N. Y., 244; McDonald v. Brice, 12 Grant's (U.C.) Chy., 48.

So the owner of land may maintain an action to have a mortgage cancelled and discharged: Beach v. Cooke, 28 N. Y., 508; Hillman v. Stumph, 1 Wilson's Superior Ct. R., 285; Hambut v. Haworth, 78 Penn. St. R., 78.

A conditional payment to the sheriff by a stranger—money to be returned if plaintiff refuses to assign the judgment, which after a time he did—is not a satisfaction, but a purchase: Smith v. Miller, 25 N. Y., 619.

Where an execution was returned satisfied, an entry of satisfaction made on the docket, and the return was afterwards vacated by order of the court; held that lands sold by the execution debtor to a *bona fide* purchaser, after the entry of satisfaction and before the vacation, could not be affected by the judgment: Taylor v. Ranney, 4 Hill, 619; Beebe v. Banks, 1 Johns., 529; Etzler v. Evans, 61 Ind., 56.

See also People v. Lansing, 8 Abb. Dec., 533; Keogh v. Delaney, 40 N. J. Law, 97; Eyre v. Burmerster, 10 H. L. Cas., 90; Costello v. Meade, 55 How. Pr., 356; Mays v. Wherry, 8 Tenn. Chy., 80.

As to the form of plea by such a *bona fide* purchaser, see Taylor v. Ranney, 4 Hill, 619.

A judgment creditor, upon a debt incurred before satisfaction, would acquire no superior lien while such satisfaction remained unvacated: Mays v. Wherry, 8 Tenn. Chy., 80.

Though a *bona fide* purchaser under such a judgment would: Etzler v. Evans, 61 Ind., 56.

As against the judgment debtor, however, his heirs, &c., such order will operate retrospectively, and carry back

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the lien of the judgment to the date of the original docket: *Taylor v. Ranney*, 4 Hill, 619.

Where one takes a mortgage on lands, knowing that a prior mortgage thereon has been fraudulently or illegally cancelled, his mortgage will be postponed to such prior mortgage: *Morgan v. Chamberlain*, 26 Barb., 163; *Ely v. Scofield*, 35 Barb., 330; *Burnstine v. Ormes*, 2 Washington Law Reporter, 387, 2 McArthur, 219.

See *Loring v. Brackett*, 3 Pick., 403; *Etzler v. Evans*, 61 Ind., 56.

Where, by mistake, a mortgage was cancelled of record by an officer of a corporation, which held it as collateral security only, it was held that such satisfaction as between the mortgagee and grantee of the mortgagor, subject to the mortgage, was void: *Smith v. Smith*, 117 Mass., 72.

See also *Hale v. Morgan*, 68 Ills., 244; *Eyre v. Burmerster*, 10 H. L. Cas., 90.

[2 Exchequer Division, 463.]

June 25, 1877.

[IN THE COURT OF APPEAL.]

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*SPICE V. BACON.

Innkeeper's Liability—26 & 27 Vict. c. 41, ss. 1 and 3—*Sufficiency of Notice limiting Liability.*

By s. 1 of 26 & 27 Vict. c. 41, no innkeeper shall be liable to make good to any guest of such innkeeper any loss of or injury to property brought to his inn . . . to a greater amount than the sum of £30, except in the following cases: Where such property shall have been stolen, lost, or injured, through the wilful act, default, or neglect of such innkeeper, or any servant in his employ. . . . Sect. 3 requires the innkeeper to exhibit a copy of s. 1 in a conspicuous part of the hall or entrance to his inn, otherwise he cannot claim the protection of s. 1.

The defendant, an innkeeper, caused a paper which purported to be a copy of s. 1 of 26 & 27 Vict. c. 41, to be exhibited in the hall or entrance to his inn, but the paper was unintentionally misprinted, and the sentence stood: "Where such property shall have been stolen, lost, or injured through the wilful default or neglect of such innkeeper or any servant in his employ."

The plaintiff, while a guest at the defendant's inn, had stolen from his bedroom at night property amounting to the value of £119:

Held, that the notice contained no statement which admitted the continuance of the common law liability for the goods or property stolen, lost, or injured through the wilful act of the innkeeper or his servant, and therefore did not protect the defendant.

THE statement of claim alleged, that the plaintiff on the 15th of November, 1875, was received by the defendant, who was the innkeeper of the Old Ship Hotel at Brighton, and lodged as a guest in the inn for reward payable by the plaintiff in that behalf to the defendant, and a certain bedroom in the inn was set apart by the defendant for the use of the plaintiff while lodging in the inn. On the night of that day, the plaintiff slept in the bedroom, and while he slept certain goods and money of the plaintiff which he had brought with him to the inn and had placed in the bedroom, to wit, a gold watch and chain with a compass attached, a gold diamond ring, signet ring, a case of instruments, a purse containing £5 in gold and some silver, were stolen

and carried away from the bedroom; and that the goods and money were stolen and lost by reason of the default and neglect of the defendant and his servants, in permitting persons of dishonest character to frequent the inn.

The statement of defence, amongst other things, alleged that *the notices, which are required under 26 & 27 [464 Vict. c. 41, s. 3⁽¹⁾], to be exhibited in order that the defendant might be entitled to the benefit of that act, were duly exhibited in the manner provided thereby, when the goods and money were brought by the plaintiff to the hotel; and that by reason of the provisions of the act the defendant was not liable to a greater extent than the sum of £30; and that he had paid this sum into court.

The plaintiff replied, that under the circumstances set forth in the statement of claim, the defendant was not protected by the statute, and that the sum of £30 was not sufficient to satisfy his claim.

At the trial, before Kelly, C.B., at the London sittings, on the 14th of February, 1877, the following facts were proved. The plaintiff was a guest at the hotel kept by the defendant, and while there, during the night of the 15th of November, 1875, the articles and money mentioned in the statement of claim, were stolen from his bedroom while he slept. The defendant had caused a copy of s. 1 of 26 & 27 Vict. c. 41, to be exhibited as required by the third section of the same act, in a conspicuous part of the hall or entrance to his inn; but the copy was unintentionally misprinted, and the sentence stood: "Where such property shall have been stolen, lost, or injured, through the wilful default or neglect of such innkeeper or any servant in his employ."

At the trial, the plaintiff contended that the variance between the first section and the copy exhibited, was a substantial variance, and disentitled the defendant to the protection of the act. He also contended that the loss was caused by the wilful act of the defendant and his servants.

The defendant contended that the plaintiff's loss was caused by *his own negligence. The jury found a [465

(¹) By 26 & 27 Vict. c. 41, s. 1, no innkeeper shall, after the passing of this act, be liable to make good to any guest of such innkeeper any loss of, or injury to, goods or property brought to his inn to a greater amount than the sum of £30, except in the following cases: that is to say, (1) where such goods or property shall have been stolen, lost, or injured, through the wilful act, default,

or neglect of such innkeeper or any servant in his employ. . . . By s. 3, every innkeeper shall cause at least one copy of the first section of this act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he shall be entitled to the benefit of this act in respect of such goods or property only as shall be brought to his inn while such copy shall be so exhibited.

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verdict for the defendant, and Kelly, C.B., subsequently directed judgment to be entered for the plaintiff⁽¹⁾.

Grantham, Q.C., and *J. H. Johnstone*, for the defendant, contended that the printed paper purporting to be a copy of s. 1 of 26 & 27 Vict. c. 41, was substantially a copy of that section, that the error was a mere verbal error unintentionally made, not designed to mislead, and could not mislead any one, and that there had been a compliance with the statute, and that the defendant was protected.

Herschell, Q.C., and *G. Bruce*, for the plaintiff, contended that the defendant was not entitled to the protection of the statute, for the omission from the copy of the word "act" altered the sense of the sentence, and that it was, therefore, a substantial and material variance: that its omission appeared to limit the liability of the innkeeper, and, if the notice had correctly stated the statute, he could claim an exemption from liability although the goods had been stolen by his servants.

J. H. Johnstone was heard in reply.

LORD CAIRNS, L.C.: We do not entertain any doubt as to the effect of the notice under the statute. I regret coming to the conclusion which I feel obliged to come to upon that point, because I have not the least doubt that there was a *bona fide* intention on the part of the defendant to give a notice which was an exact compliance with the statute, and that the omission which was relied upon has occurred entirely *per incuriam*; but it has occurred, and we must deal with the notice as it stands.

Now at first it rather appeared that it might be looked upon as if there had been an omission of a word not material to the sense, and I certainly should not be prepared to hold that, if a paper had been put up in an inn, which was intended in good faith to be a copy of the section of the 466] statute, and that all that could be said *of it in opposition to its being a copy was that a word or two words which were not material to the sense and to the operation of the statute had been omitted, the paper had ceased to be, or failed to be, a copy within the meaning of the statute. But the word which is here omitted is the word "act," and the sentence, which should have run: "Stolen, lost, or injured, through the wilful act, default, or neglect of such innkeeper, or any servant in his employ," runs: "Stolen,

(1) The Court of Appeal reverses this judgment and entered judgment for the defendant, on the ground that on the facts proved in evidence the jury were war-

ranted in finding that there was such negligence or absence of care on the part of the plaintiff as disentitled him to recover in the action.

lost, or injured through the wilful default or neglect of such innkeeper or any servant, in his employ." There is, therefore, nothing in the notice—no statement—which admits the continuance of the common law liability for the goods or property which shall have been stolen, lost, or injured through the wilful act of the innkeeper or any servant in his employment. The result of that is this: if it could be supposed that, in a case like the present, the goods were actually stolen by a servant in the employment of the innkeeper, the notice, as it now runs, would be a notice asserting that the common law liability had ceased even in that case. It would be a notice not admitting the continuance of the common law liability, where what had led to the loss of the goods had been the act of a servant in the employ of the innkeeper.

It is sufficient to say if that be so, the omission here entirely alters the operation of the section of the statute. The notice is, therefore, not a notice stating the law in the way the first section of the statute states it. I feel obliged, I repeat reluctantly, to hold that the claim for protection under the statute fails, and that the case must be dealt with as if the statute never had passed.

COCKBURN, C.J.: I concur in the view which has been just stated by the Lord Chancellor.

I quite concur in thinking that if this were a mere clerical error, we might hold the notice sufficient to meet the requirement of the act, as still being a copy; but when we find an omission of that which is material, with a view to a clear and distinct statement of the rights and liabilities of the parties respectively, we have an omission which is far beyond a mere clerical error. It is an omission of a substantial part of the notice. When we have an omission of a material and really substantial part of the *notice required [467 by statute, I cannot think it a copy sufficient to satisfy the requirements of the act.

BRAMWELL, L.J.: I concur that on this point our judgment must be for the plaintiff. -

Judgment accordingly.

Solicitor for plaintiff: *S. R. Hoyle.*

Solicitors for defendant: *Stibbard & Cronshey*, for Woods & Dempster, Brighton.

See Edwards' Bailm. (2d ed.), §§ 450-479; Grinnell v. Cook, 3 Hill, 485; McPr., 147; Jallie v. Cardinal, 35 Wisc., 118; Seymour v. Cook, 35 How. Pr., 180, 53 Barb., 451; Dawson v. Cholmeley, Dav. & Mer., 348; Sunbolt v. Y., 571; Van Wyck v. Howard, 12 How. Alfred, 3 M. & W., 248; Turrell v.

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Crawley, 7 N. Y. Leg. Obs., 230; Cutler v. Bonney, 30 Mich., 259, 18 Am. Rep., 127, 130 note; 2 Sto. on Cont., § 744; Bouv. Inst., § 1016.

Liability for property stolen by companion of guest: Gile v. Libby, 38 Barb., 70; Buddenburgh v. Benner, 1 Hilton, 84; Dessauer v. Baker, 1 Wilson's Superior Ct. R., 429.

It is provided in New York, by statute, that "Whenever the proprietor or proprietors of any hotel shall provide a safe in the office of such hotel, or other convenient place for the safe keeping of any money, jewels or ornaments belonging to the guests of such hotel, and shall notify the guests thereof, by posting a notice (stating the fact that such safe is provided, in which such money, jewels or ornaments may be deposited), in the room or rooms occupied by such guest, in a conspicuous manner, and if such guest shall neglect to deposit such money, jewels or ornaments in such safe, the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels or ornaments, sustained by such guest, by theft or otherwise: Laws 1855, ch. 421, p. 774, 3 Edm. St., 66.

Similar statutes undoubtedly exist in most of the states.

Innkeepers are still insurers of the safety of the property of their guests, notwithstanding the act of 1855 (chap. 421, p. 774); the only effect of that statute being to so far modify their common law liability that it does not extend to money, jewels or ornaments not deposited in the safe, provided for that purpose, where the innkeeper has complied with the provisions of the act on his part.

The liability is not limited to such an amount of money as may be reasonably necessary for the travelling expenses of the guest, but covers whatever amount may be received and deposited by the innkeeper in the safe.

The plaintiff being a guest at the defendant's inn, delivered a package, containing \$20,000, to a young man in charge of the office, to be deposited in the safe. It was inclosed in a sealed envelope, and the name of the guest was written in pencil on the outside; but no indorsement indicated its contents or value. The notices posted in the rooms of the inn required that valuable packages so deposited should

be "properly labelled." The plaintiff was asked what the envelope contained, and replied "money." It was received and placed in the safe, and was subsequently stolen therefrom. Held that the defendants were liable to the full amount of the moneys so deposited: Wilkins v. Earle, 44 N. Y., 172, reversing 3 Rob., 352, 10 Abb., 190.

An innkeeper, who provides a safe for the reception of money, jewels or ornaments, and posts up in the room of his guest a notice that they may be deposited in the safe, pursuant to a statute declaring that he shall not be liable for any loss thereof in case the guest neglects to so deposit them, is not liable for the loss of any money, jewels or ornaments not deposited in the safe. The protection to innkeepers, given by the statute, is not limited to money or valuables in excess of what the guest may reasonably require for his travelling expenses or personal convenience, but embraces all "money, jewels or ornaments" which the guest brings with him, without reference to the amount or value: Hyatt v. Taylor, 43 N. Y. Rep., 258, affirming 51 Barb., 632.

See Milford v. Wisley, 1 Wils. Superior Ct. R., 119.

Under the provisions of the act regulating the liability of hotel keepers (Laws of 1855 chap. 421), which provides that when the proprietor of any hotel provides a safe for money, jewels or ornaments of guests, and shall post a notice stating the fact in the rooms, if the guests shall neglect to deposit, the proprietor shall not be liable for losses, etc.; the statutory exemption applies to *all* money, jewels and ornaments, and applies to every case where the guest has the time and an opportunity to make the deposit; his omission to do so is a neglect within the meaning of the statute, although no carelessness or imprudence is shown.

Plaintiff and her husband arrived at defendant's hotel about 3 p.m. and were given a room; the dinner hour was from 2 to 4 p.m.; they went to dinner, locking their room, and leaving her trunk locked therein; they were absent about twenty minutes; during that time the room was unlocked, the trunk broken open and various articles of jewelry, worn by plaintiff in ordinary dress, of the value in all of less

than \$300, were abstracted. The loss was without carelessness or negligence on the part of plaintiff; defendants had provided a safe and posted the notice required by the statute. In an action to recover for the loss, held that the statutory exemption applied to the articles stolen; that plaintiff had sufficient time and opportunity to make the deposit, and although there was no negligence on her part, defendants were not liable, overruling *Gile v. Libby*, 38 Barb., 70, and distinguishing *Bendetson v. French*, 46 N. Y., 266; *Rosenplaenter v. Roessle et al.*, 54 N. Y., 263.

See also *Elcox v. Hill*, U. S. Supreme Ct., 18 Am. Law, N. S., 395.

Plaintiff, a guest in defendant's hotel, offered to the book-keeper a large package, containing jewelry, and without stating its contents, requested him to deposit it in the safe. The book-keeper replied that it was not necessary, and requested plaintiff to take it to his room, saying it would be just as safe there. When plaintiff was ready to leave, he packed his trunk, in which the package then was, delivered up the key of his room to the hotel clerk, and requested the trunk to be brought down immediately. This was not done; and upon plaintiff's calling for it shortly after, it was found broken open and the package stolen. Held that defendant could not be held responsible for a refusal to receive; but that there was a "neglect to deposit" within the meaning of the innkeeper's act of 1855 (Laws 1855, chap. 421). That said act, however, only relieves the hotel proprietor from losses occasioned by such neglect; and that, as in this case, the loss happened at a time when the package, if it had been deposited, would have been returned to the guest to be packed prior to departure, defendant was liable: *Bendetson v. French*, 46 N. Y., 266, reversing 44 Barb., 31.

A proprietor of a house or hotel kept on what is called the "European plan," i. e., the renting of rooms, with a restaurant for meals, is "the proprietor of a hotel" within the meaning of the act of 1855: Session Laws, chapter 421.

Where a guest at the hotel entered his name on the register under a printed heading, as follows: "*Money,*

jewels and other valuable packages, it is agreed, shall be placed in the safe in the office, otherwise the proprietor shall not be responsible for any loss," and there was no proof that this notice was seen or assented to by the guest. Held that it was not his contract.

A watch and chain are not, within the meaning of the statute, *a jewel or ornament*, for the loss of which a hotel proprietor is not liable, but is protected under the statute. The cases of *Ramaley v. Leland* (6 Robt., 358); *Hyatt v. Taylor* (42 N. Y., 258); and the same case in the court below (51 Barb., 632); also, *Gile v. Libby* (38 Barb., 70), cited and commented upon in support of the above propositions: *Bernstein v. Sweeny*, 38 N. Y. Supr. Ct. Rep. (1 J. & S.), 271.

See also *Krohn v. Sweeney*, 2 Daly, 200; *Milford v. Wisley*, 1 Wilson's Supr. Ct. R., 119.

A person who keeps a mere boarding house is not: *Light v. Abel*, 6 Allen, New Brunswick, 400.

At common law, innkeepers are insurers of the property of their guests.

Under our statutes (Laws of 1855, chap. 421), innkeepers who have provided a safe, and posted notices of the fact in accordance with the act are exonerated from liability for "money, jewels and ornaments" of a guest not deposited in the safe.

But the exemption is limited, to the particular species of property named, and, being in derogation of the common law, cannot be extended in its application by doubtful construction: *Ramaley v. Leland*, 48 N. Y., 539, reversing 6 Rob., 358.

Personal notice to a guest at an inn that a safe is provided for keeping money, jewels, etc., and that the innkeeper will not be liable for their loss, unless given to him for deposit therein, is equivalent to the posting in the guest's room of a written or printed notice, under the statute (ch. 421, of 1855). Independent of the statute, the leaving by the guest of \$2,000 in gold coin in his trunk in a room, with no person therein, in a hotel in the city of New York, after such actual notice, is such negligence as to discharge the innkeeper from any liability: *Purvis v. Coleman*, 21 N. Y. Rep., 111, affirming 1 Bosw., 321.

See also *Stanton v. Leland*, 4 E. D.

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Smith, 88; Berkshire, etc., v. Proctor, 7 Cush., 417; Wilson v. Halpin, 80 How., 124; Bodwell v. Bragg, 29 Iowa, 282.

Chapter 818, Laws of 1864 (which provides that "no innkeeper in this state who shall constantly have in his inn an iron safe in good order, and suitable for the safe custody of money, jewelry and articles of gold and silver manufacture," etc., and who complies with the requirements of that act, shall be liable for the loss of such articles by any guest, unless, etc.), held to apply to gold or silver watches, and watch chains, usually worn by the guest about his person: Stewart v. Parsons, 24 Wisc., 241.

An innkeeper is liable for valuables stolen from the sleeping room of one who is a transient guest and not a permanent boarder, notwithstanding the fact that the hotel contains an iron safe designed for the bestowal of such articles, if notice thereof posted in the rooms is in small type, and not in large or plain English type, as required by the statute: Porter v. Gilkey, 57 Missouri, 285.

An innkeeper is bound to pay for goods stolen in his house from a guest, unless stolen by the servant or companion of such guest. If, however, the guest is intoxicated at the time of the robbery, and his intoxication contributes in any way to his loss, he cannot recover: Walsh v. Porterfield, 6 N. Y. Weekly Dig., 260, Supreme Court, Penn.; Jalie v. Cardinal, 85 Wisc., 118.

An innkeeper (when no question of statutory law is involved) will be discharged from liability for the loss of a guest's goods when it is attributable to the negligence, fault or fraud of the guest, or to the act of God or the public enemy.

Non-compliance by the guest with a reasonable requirement of the innkeeper is such negligence, on his part, as to exonerate the innkeeper from a loss caused thereby. This is the point ruled in Purvis v. Coleman (21 N. Y., p. 111). But the mere giving to, and acceptance by, the guest of the key of his chamber does not impose on him any duty or obligation to keep the door thereof locked.

If, under such circumstances, the

guest, on retiring for the night, omits to lock the door of his room and permits it to remain unlocked during the night, such omission and permission does not constitute such negligence as to relieve the innkeeper from liability for a theft of the guest's goods from his room during the night: Classen v. Leopold et al., 2 Sweeny's Rep., 705; Buddenburgh v. Benner, 1 Hilton, 84; Van Wyck v. Howard, 12 How. Pr., 147; Milford v. Wisley, 1 Wilson's Superior Ct. R., 119; Chamberlain v. Masterson, 26 Ala., 871.

Though failure to lock the door is evidence of negligence: Jalie v. Cardinal, 85 Wisc., 118.

The plaintiff, a traveller, went to an hotel at Bristol, arriving at 11 p.m. In the commercial room he took from his pocket a canvas bag containing £22 in gold, some silver and a £5 note, and took out 6d. to pay for some stamps. He was then shown to a bedroom on an upper story, the door of which had a lock and a bolt, and the window of which looked out on to a balcony. He was cautioned by the chambermaid that the window was open, but nothing was said about locking the door. On going to bed he closed the door, but did not lock or bolt it, and placed his clothes, the bag of money being in one of the pockets, on a chair at his bed side. During the night some one entered his room by the door while he slept and stole the bag and money. The judge (of a county court) in summing up the case to the jury, after explaining to them the law as to the liability of innkeepers for the safe custody of the property of their guests, told them that the question for their consideration was, whether the loss would or would not have happened if the plaintiff had used the ordinary care that a prudent man might reasonably be expected to have taken under the circumstances. The jury found for the defendants. Held that the direction was right, and the verdict warranted by the evidence: Oppenheim v. White Lion Hotel Co., Law Rep., 6 Com. Pl., 515; Elcox v. Hill, U. S. Supreme Court, 18 Am. Law Reg., N.S., 395.

The loss of the goods of a guest, while at an inn, is presumptive evidence of negligence on the part of the

innkeeper. Upon this presumption he is *prima facie* liable. But he can repel it by showing that the loss is attributable to the personal negligence of the guest himself.

Gross negligence need not be shown. It is enough to exonerate the innkeeper, if the guest has, by his own neglect or imprudence, exposed his goods to peril.

In an action against an innkeeper, to recover for the loss of money contained in a valise, the defendant has a right to have the jury instructed, in reference to the plaintiff's conduct at the time of the loss, that if they are of opinion that in concealing the fact that the valise contained money, and treating it as mere baggage, he was guilty of gross negligence, the defendant was exonerated from liability: *Fowler v. Dorlan*, 24 Barb., 384; *Jalie v. Cardinal*, 35 Wisc., 118; *Milford v. Wisley*, 1 Wilson's Superior Ct. R., 119.

See *Dessaure v. Baker*, 1 Wilson's Superior Ct. R., 429.

Held, on demurrer to the declaration set out below, that an innkeeper is not responsible for neglecting to warn his guest of the breaking out of a fire in the building so as to enable him to escape, and therefore that the innkeeper is not liable in an action by the guest's personal representative for damages in consequence of the death

resulting from such fire: *Hare v. Henderson*, 43 U. C. Q. B., 571.

As to liability of an innkeeper for property burned by fire, see *Hewlett v. Swift*, 83 N. Y., 571, affirming 43 Barb., 280; *Ingallsbee v. Wood*, 83 N. Y. 577, affirming 36 Barb., 452; *Mowers v. Fethers*, 61 N. Y., 84, reversing 6 Lans., 112; *Cutler v. Bonney*, 30 Mich., 259; 2 Laws N. Y., 1866, chap. 658, p. 1415, 6 Edm. St., 792; *Faucett v. Nichols*, 64 N. Y., 877, reversing 4 Thomp. & Cooke, 597, 2 Hun, 521, but not on points decided in Supreme Court.

As to when a party is a guest and when not, see *Hancock v. Rand*, 17 Hun, 279, affirmed by Court of Appeals; *Fitch v. Coster*, 17 Hun, 26; *Mowers v. Fethers*, 61 N. Y., 84, reversing 6 Lans., 112; *Healey v. Gray*, 68 Maine, 489; *Lynar v. Drossop*, 86 U. C. Q. B., 230; *Ingallsbee v. Wood*, 83 N. Y., 571, affirming 36 Barb., 452; *Berkshire, etc., v. Proctor*, 7 Cush., 417; *Pinkerton v. Woodward*, 33 Cal., 557; *Grinnell v. Cook*, 3 Hill, 485; *Chamberlain v. Masterson*, 28 Ala., 371; *Allen v. Smith*, 12 C. B., N.S., 638, 104 Eng. C. L.; *McDonald v. Edgerton*, 5 Barb., 560; *Walling v. Potter*, 35 Conn., 183, 9 Am. Law Reg., N.S., 618, 620 note; *Washburn v. Jones*, 14 Barb., 193; *Hall v. Pike*, 100 Mass., 495.

C A S E S

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE,

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS,

X L V I C T O R I A .

[2 Probate Division, 145.]

April 24, 1877.

[IN THE COURT OF APPEAL.]

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*THE CARGO EX SCHILLER⁽¹⁾.

Saving Life—Salvage—Liability of Cargo—17 & 18 Vict. c. 104, s. 458.

A German steamship was wrecked in British waters, and the lives of ten passengers and of some of her crew were saved by certain boats. Subsequently, divers employed by the owners of the cargo in the steamship succeeded in recovering from the wreck a large amount of specie. A cause of salvage was instituted on behalf of the owners, masters and crews of the boats against the owners of the specie:

Held, by James and Baggallay, L.JJ., affirming the judgment of the judge of the Admiralty Division (Brett, L.J., dissenting), that the plaintiffs were entitled to be paid salvage remuneration out of the proceeds of the specie.

THE German steamship Schiller, on the 7th of May, 1875, ran on one of the rocks of the Scilly Islands, and soon afterwards sank in deep water. Ten of the passengers and some

(¹) Affirming 18 Eng. R., 483,

of the crew were picked up and saved by boats from the Scilly Islands. Only small portions of the hull and stores of the Schiller were saved; but some time after the ship was lost, the owners of some specie on board employed divers, and at great trouble and expense recovered four barrels of specie, the value of which was £40,000. The owners, masters, and crews of the boats which had saved the ten passengers then instituted a cause of salvage against the owners of the specie, claiming remuneration.

The judge of the Admiralty Division held that the cargo was liable to pay salvage, and awarded to the salvors £500. The facts are stated in detail in the report of the case in the court below⁽¹⁾.

The owners of the cargo appealed.

1876. Dec. 8, 11. *Butt*, Q.C., and *O. Lodge*, for the owners of the cargo: This claim is made under the provisions of the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 458. Before this statute the Court of Admiralty was, no doubt, in the habit of awarding a larger sum for salvage where life had been saved, but the act merely confirmed that practice, leaving it as it had been, that if *the [146 ship or any part was saved, the ship paid salvage, if the cargo was saved the cargo paid; but passengers have nothing to do with the cargo, and each passenger ought to pay for being saved, or the salvors may be paid out of the Mercantile Marine Fund. These salvors can have no more claim on the cargo saved than they could have for work done to the ship. They never in any manner offered to assist the owners of the cargo, who might have spent much money and have recovered nothing, but lay by to see the result and then make this claim.

The *Admiralty Advocate* (*Dr. Deane*, Q.C.) and *W. G. F. Phillimore*, for the plaintiffs: The 458th section of the Merchant Shipping Act expressly provides for the payment by the owners of the cargo for services rendered in saving the lives of the persons belonging to a ship stranded on the shore of the United Kingdom. Even if the wreck is in the hands of the owner, the law, under s. 450, takes hold of it in order to see that the liabilities are satisfied. The owner cannot take it without discharging his duties. Wherever the ship is, the receiver of wrecks is to take charge; and s. 468 shows how the salvors are to be paid. The express object of that section was that those who save life should be in all cases rewarded. Had these boats not stopped to pick up these

⁽¹⁾ 1 P. D., 473; 18 Eng. R., 483.

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passengers they would probably have got something from the wreck, and then they must have been paid. If nothing has been saved, then they are, under s. 459, to be paid out of the Mercantile Marine Fund. If there was any doubt, it has been settled by the case of *The Fusilier* (*).

The policy of the law is clearly that those who save life are to be rewarded, and the law has been altered accordingly: 25 & 26 Vict. c. 63, s. 59. The cases of *The Cairo* (*) and *The Coromandel* (*) show that salvage for saving life is always to be given. Suppose that this specie had been raised by strangers they would have had salvage, and so must these salvors: *The Willem III* (*). Under s. 458 everything is charged.

Butt, Q.C., in reply: The words of s. 458 mean that each must pay for that which concerns him, otherwise the owner of the cargo may have to pay for services rendered to the [147] ship, which is absurd. *The decision in the case of *The Fusilier* (*) is very doubtful, but there property was saved. In order to impose a new and unreasonable liability the enactment must be quite clear. If the owners of the cargo ought to pay for saving the lives of the passengers, they ought to be liable to be sued for it; but can such a proposition be maintained? It would be as reasonable to make one passenger pay for the saving the lives of the others as to make the owners of the cargo pay. *Cur. adv. vult.*

April 24, 1877. BRETT, L.J.: In this case, whilst ship and cargo were in danger, the plaintiffs saved the lives of fifteen persons, some of whom were of the crew of the ship, and others were passengers on board her. But after such lives were saved, the ship and cargo sunk in deep water, and all who had at any time tried to save ship and cargo abandoned any further attempt to do so. Some time afterwards, the defendants, who were owners of a part of the sunken cargo, which was valuable specie, engaged a staff of divers and workmen, and at great expense raised and recovered four barrels of such specie of the value of £40,000. The claim in the suit was made against the defendants, as owners of the specie, by the plaintiffs, as life salvors only, but no part of the ship or cargo was saved by any one who could, in respect of having saved it, have claimed salvage. The specie was not saved by any one who could claim salvage for saving it, nor was it liable to be seized and retained by the Admiralty in respect of any claim which could be

(*) 3 Moo. P. C. (N.S.), 51; 1 Br. & L., 341.

(*) Law Rep., 4 A. & E., 184.

(*) Sw., 205.

(*) Law Rep., 3 A. & E., 487.

made for saving it, and the question is whether, under the statute, the plaintiffs can enforce any claim against it for life salvage. In order to determine the true construction of the statute, let us first consider whether this specie was when it was raised from the bottom of the sea "wreck," even within the extended meaning given to the term by the statute 17 & 18 Vict. c. 104, s. 2: "Wreck shall include jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water." It was not "wreck" in the common law meaning of the word. "Nothing shall be said *wreccum maris* but such goods only which are cast or left on the land by the sea:" *Sir Henry Constable's Case* ('). The case goes on to say * "Flotsam, is when a ship [148 is sunk or otherwise perished, and the goods float on the sea. Jetsam, is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards, notwithstanding, the ship perish. Lagan (*vel potius ligan*), is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing that will not sink, so that they may find them again." This specie never was within any of these definitions, and even if it were, would be taken out of them by the fact of its being in the possession of the owner before it was or could be taken possession of by any one else. For in the same case (') the reason is given why such things were given to the King. "Note, reader, at first the common law gave as well as wreck, jetsam, flotsam, lagan, upon the sea, as estray, &c., treasure trove, and the like, to the King, because, by the rule of the common law, when no man can claim property in any goods, the King shall have them by his prerogative." Applying this principle to the former definitions, it seems to me that nothing can be considered to be flotsam, jetsam, or lagan, within any effective legal definition of those things, if it has never been taken possession of by any one but the true owner. This specie was once "derelict," but ceased to be so the moment the true owners of it resumed the exercise of their rights of ownership and began to endeavor to recover it, whilst no one else was endeavoring to save it. This specie was, therefore, in my opinion not "wreck" within the meaning of the statute at the time when it was recovered by its owners. If so, no receiver of wreck could legally interfere with it or with the owners of it in any respect. Even if it were wreck

(') 5 Rep., 106 a.

(') At fol. 108 b.

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within the meaning of the statute at the time when it was recovered, the only relation to it of a receiver of wreck could be that he would be entitled to have notice under s. 450 that the owner had found it and had taken possession of it.

The next matter to be substantiated is that, independently of the statute, no claim for salvage of any kind could be enforced against this specie by anybody. It is true that an [49] action *in personam* might, under certain circumstances, be maintained in the Admiralty Court for salvage (see *The Hope*, 3 C. Rob. 215, and *The Trelawney*, in a note to that case), it being understood that the monition spoken of in those cases was then the mode of initiating a suit *in personam* in the Court of Admiralty. But in both those cases property had been saved, so as to give a claim for salvage. In both, therefore, if the property had come within the jurisdiction of the Admiralty Court, it might have been seized, and an action *in rem* might have been prosecuted. Both are, therefore, consistent with what was said in *The Thetis* (*) and *The Neptune* (*), that salvage is the service which volunteer adventurers spontaneously render to the owners in the recovery of property from loss or damage at sea, under the responsibility of making restitution and with a lien for their reward. This shows that the foundation of the Admiralty jurisdiction in the awarding of salvage is, the power of enforcing the maritime lien obtained on property saved by salvors. This is in terms declared to be the foundation of the jurisdiction in *The Zephyrus* (*): "The jurisdiction of the court in salvage causes is founded upon a proceeding against property which has been saved." The importance of thus defining the foundation of the jurisdiction in salvage matters is that it shows why the Admiralty had no jurisdiction to entertain claims for life salvage. In *The Fusilier* (*) Dr. Lushington thus summed up the law and the reasons for it: "I will begin by stating what was the law of the court respecting life salvage before any statute was passed on the subject of salvage. Where no property had been saved and life alone had been preserved from destruction, no suit for salvage reward could be maintained. One reason for this state of the law was, that no property could be arrested applicable to the purpose. There could be no proceeding *in rem* in the ancient foundation of a salvage suit. In some cases it happened that one set of persons exclusively saved life, and another wholly distinct set

(*) 3 Hagg. (Adm.), 14, see p. 48.

(*) 1 Wm. Rob., 329, at p. 331.

(*) 1 Hagg. (Adm.), 227, see p. 236.

(*) 1 Br. & L., at p. 344.

saved the ship and cargo ; but in this case also the salvors of life could not render the property amenable to their claims. But where life and property had been saved by one set of salvors, it was the practice of the courts to give a *larger amount of salvage than if the property only [150 had been saved ; and this doctrine rests on high authority. The practice, too, was that all the property saved should be liable to pay such increased rate of salvage ; the ship, the freight, and the cargo, each in proportion to its value." It seems to me obvious that in this recapitulation of the law of salvage the word "saved" is used in the sense of "salved," i.e., "saved by salvors." The reasoning depends on that meaning being given to the word "saved." And in all cases and books dealing with this branch of law the word "saved" is, as I believe, used in the sense of "salved." This statement of the law shows clearly that, independently of the statute, no claim could be substantiated in the present case, because no property has been salved by any one. There is no property which, irrespective of the statute, could be seized by way of lien, so as to give the Admiralty Court any jurisdiction to enforce any lien against it, or to deal with it at all. The question is, whether the statute has given to the Court of Admiralty a right to deal with any property with which it could not have dealt at all before the statute—which it had no jurisdiction to seize or detain before the statute.

The former statute (9 & 10 Vict. c. 99, s. 19) enacts that every person who shall act or be employed in any way whatsoever in the saving or preserving of any ship, or of any part of the cargo thereof, or of the life of any person on board the same, &c., shall be paid a reasonable reward or compensation by way of salvage for such service by the commander or owner of the said ship, or by the merchant whose ship, vessel, or cargo shall be so saved. If the reward to be paid had been simply a money reward, it would have been unnecessary to use the phrase "by way of salvage." That phrase introduces the law of salvage. The enactment that the reward shall be "by way of salvage" gives jurisdiction to the Admiralty, but the jurisdiction of the Admiralty is founded on the possibility of a proceeding *in rem*. Moreover, among the classes to pay are the owners of a ship saved, and the owner of a ship or cargo saved. So that the whole section is founded on the assumption that property has been saved. It cannot be doubted, as it seems to me, that "saved" is used for "salved by salvors," when the compensation is to be "by way of sal-

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151] vage." The enactment *does not give a new subject-matter on which the Admiralty may enforce a lien, but gives a new cause on service in respect of which the Admiralty may enforce a lien upon the same subject-matter as before. The sections 458 and 459 of 17 & 18 Vict. c. 104, seem to me to use the same technical phraseology in dealing with the doctrine of salvage as has been invariably used in every case, treatise, and statute on salvage. The word "saved" in such phraseology is used for "salved," i.e., "saved by salvors." This is shown in s. 458 by the statement that there shall be payable to the person by whom such services or any of them are rendered "a reasonable amount of salvage." It is not said a reasonable compensation, but a reasonable amount of salvage. So in s. 459 it is salvage which is payable, not compensation. And the mode of enforcing the claim in the last resort is by sale under s. 469. The whole remedy is evidently founded on Admiralty remedy, which, though it does not absolutely shut out a remedy by suit *in personam* either in the Admiralty Court, or, mayhap, in some other division of the High Court, yet shows that it is a remedy for a salvage claim, which imports, as is stated in *The Zephyrus* (1) and in *The Fusilier* (2), the possibility of a suit *in rem*. The case of *The Fusilier* (3) is in its facts consistent with this view of the statutes. In it cargo was salvaged; it is not therefore, as to its facts, an authority against the defence in this case. Neither, as it seems to me, is any of the reasoning adverse to the contention of the defendants in the present case. The decision in *The Fusilier* (4) is in reality founded on the view that the statute was dealing with the causes on services for which salvage reward might be awarded, and not with the subject-matter in which the reward was to take effect. That is the reason why the strong decision is arrived at that the omission of the word "cargo" in s. 459 does not alter the law that cargo was one subject-matter of a grant of salvage reward. If it did not alter the law as to what was subject-matter of a salvage lien in that case, it does not in this. The case of *The Cairo* (5), upon the facts stated in the judgment, goes no further than *The Fusilier* (6), as the ship had received salvage services, if it is taken as a decision.

152] "The construction," says Dr. Lushington in *the latter case (7), "that cargo should not contribute to life salvage, would work a great change in the law, and go much beyond the grievance which existed." "The Legis-

(1) 1 Wm. Rob., 329.

(2) Law Rep., 4 A. & E., 184.

(3) 3 Moo. P. C. (N.S.), 51; 1 Br. & L., 341.

(4) 1 Br. & L., at p. 345.

lature," says Lord Chelmsford (1), "in dealing with the subject of life salvage, must be taken to have been aware of this practice, and to have intended to confer upon the Court of Admiralty a power of doing that directly which they had been so long in the habit of doing indirectly." But what the Admiralty had been in the habit of doing indirectly was to give reward for life salvage, when it could be paid out of or by means of property which had itself been saved, in the sense of having been saved by salvors. The Admiralty had never assumed jurisdiction to deal with property which had never been saved by any salvor. The doctrine, therefore, does not include the present case. There is ample scope for the application of the statute within the doctrine, without holding that it includes the present case. It seems to me contrary to the ordinary principles of construction to say that, without words more expressive than any used in this statute, property, which before the statute was not the subject-matter of any salvage suit—which was not capable of being properly brought within any jurisdiction of the Admiralty Court—should now be swept into such jurisdiction, and be made the subject of such a suit. It is true that color is given to a contrary view by Dr. Lushington in *The Coromandel* (2). "I apprehend," he says, "the Legislature, in the first place, was well aware that there were many instances in which life was saved and property entirely lost, and that consequently there was no reward which could, as a matter of right, be claimed by those who, perhaps at the risk of their own lives, had saved the lives of others, and they meant to provide for that contingency in the first instance." My belief is that Dr. Lushington was there alluding to the power given to the Board of Trade to award a sum of money, where no property or an insufficient amount of property is saved. If not, the facts of the case did not raise the point, for the ship was saved. In such view, the statement would be a *dictum* of authority, and no more, and I could not agree with it.

*Upon that which I apprehend to be the true construction of the statute, arrived at from the considerations stated above, I am of opinion that no salvage claim could be legally enforced against the specie or its owners in this case, and therefore that the judgment appealed against should be reversed. [153

BAGGALLAY, L.J.: The state of the law affecting life salvage as it existed, or was recognized, prior to the passing of the Merchant Shipping Act, 1854, was described by Dr.

(1) 3 Moo. P. C. (N.S.), at p. 71.

(2) Swab., 205, at p. 207.

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Lushington in the passages of his judgment in the case of *The Fusilier* (¹), to which Sir Baliol Brett has referred, and it is unnecessary for me to add to the description so given, nor do I propose to refer further to the circumstances of the present case than to observe that the claim of the plaintiffs is resisted by the defendants upon the grounds, first, that, having regard to the provisions of the act of 1854, the claims of life salvors can in no case be enforced against the owners of cargo, but only against the owners of the ship, or, failing that, against the Mercantile Marine Fund; and, secondly, that if such claims can to any extent be enforced against the owners of cargo, life salvors are not by law entitled to any remuneration as against cargo which has not been salvaged, in the ordinary acceptance of the expression, either by themselves or by any other persons, but has been subsequently recovered by agents employed by the owners for that purpose. As regards the first of these points, it was admitted that adverse decisions had been given both in the Court of Admiralty and in the Privy Council, but it was urged upon us, as it had been upon the judge of the Admiralty Court, that these decisions should be reviewed. The judge of the Admiralty Court gave judgment in favor of the plaintiffs, and I am of opinion that his judgment should be affirmed.

The substantial questions for our consideration are as to the effect of the provisions of the act of 1854, and to that I propose to at once address myself. Now, omitting the references to the saving of "wreck," which do not appear to me to have any bearing upon the questions now under consideration, the 458th section enacts that whenever a ship is [54] stranded or otherwise in distress, *and "services are rendered by any person, (1) in assisting such ship or boat; (2) in saving the lives of the persons belonging to such ship or boat; (3) in saving the cargo or apparel of such ship or boat or any portion thereof," "there shall be payable by the owners of such ship or boat, cargo, apparel, or wreck, to the person by whom such services, or any of them, are rendered, or by whom such wreck is saved, a reasonable amount of salvage." Now these words are very wide; if any one of the three classes of service is rendered, for instance, if the saving of life is the only service, the owners of the several classes of property, ship, cargo, and apparel, are all made liable to pay a reasonable amount of salvage to the person rendering the service. This is the grammatical meaning of the words used in s. 458. I am

(¹) 3 Moo. P. C. (N.S.), 51; 1 Br. & L., 341.

unable to follow the argument that has been addressed to me, that the words creating or declaring the liability are to be read *reddendo singula singulis*. If the service of saving life had been omitted, there might have been some weight in the argument that the owners of ship, cargo, and apparel were to be respectively liable to the salvors of the property of which they were respectively the owners; but upon whom, if this principle is to be adopted, is the liability to be imposed in cases of the salvage being confined to life? It is clear from the terms of the section that the burden is to fall somewhere, and why, so far as the provisions of this section are concerned, should it be imposed upon the owners of the ship any more than upon the owners of the cargo? If the solution of the question depended upon the proper effect to be given to s. 458, and upon that alone, I think there could be no question as to the liability being imposed upon the owners of cargo as well as upon the owners of the ship.

But what is the nature and extent of the liability imposed? In the terms of the section, it is a liability to pay "a reasonable amount of salvage;" but is this to be construed as a general personal liability, to be enforced against the owners under any circumstances, whether the ship and cargo are lost or not, or as a liability capable of being enforced against, and therefore limited to the value of, the property, whether ship or cargo, saved from destruction; and if the latter be the true construction, is the *liability lim- [155 ited to the value of the ship or cargo saved by salvors, as the expression is ordinarily understood, or are they to comprise also ship or cargo saved from destruction by other means, as by reason of the ship riding out the storm, or of the cargo being recovered through the exertions of the owners, or of persons specially employed for that purpose? The subsequent sections of the act, when taken in connection with the 458th, throw much light upon these questions. In s. 459 we find a provision that, at first sight, gives rise to a doubt whether it was not the intention of the Legislature to provide that the liability to the payment of life salvage should be confined to the owners of the ship, and should not extend to the owners of the cargo, and this view, as I have already said, has been pressed upon us by the counsel for the appellants. The provision in question is to the effect that life salvage shall be payable by the owners of the ship in priority to all other claims of salvage, and that where the ship is destroyed, or where the value thereof is insufficient to meet the amount of life salvage, the Board of Trade may

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award to the salvors, out of the Mercantile Marine Fund, such sums as it may deem fit, in whole or part satisfaction of the amount of salvage payable. Now it is, in the first place, to be remarked that, if it had been the intention of the Legislature that liability in respect of life salvage should be confined to the owners of the ship, it is somewhat strange that it has not said so in plain terms, but has left it to be inferred from the terms of two sections which, in this view of the case, would be conflicting. Again, if the 459th section is to have the effect contended for by the appellants, it would follow that, in cases in which ship, cargo, and life are all saved by the same salvors (for the section is not confined to cases in which life alone is saved), the owners of cargo would be relieved from the liability to which under the old law they would have been subject—a result which would be contrary to the whole scope and scheme of the enactment, which was to increase, and not to diminish, the rewards for life salvage. But some reliance has been placed by the appellants upon that portion of s. 459 which provides that where the ship is destroyed, or where the value thereof is insufficient to meet the amount of life salvage, the Board of [56] Trade may award to the *salvors, out of the Mercantile Marine Fund, such sums as it may deem fit in whole or part satisfaction of the amount of salvage payable. Now these words taken *per se* do not, in my opinion, carry the argument, that the owners of the ship are alone liable, any further than the earlier words in the section to which I have already adverted, but they appear to me to negative any general personal liability of the owners of the ship; for if it had been intended by the Legislature that there should be any such general liability of the owners, it is difficult to understand why, in the event of the ship being wholly or partially destroyed, they should be relieved from a liability primarily cast upon them, and that it should be imposed upon the Mercantile Marine Fund. Upon the whole, it appears to me that the true effect of s. 459 is merely to give, as against the ship, a priority to claims in respect of life salvage over all other salvage claims whatsoever, and to leave, as well to life salvors as to salvors of property, all such other rights and remedies as they might be entitled to, either under the old law or under the Merchant Shipping Act. And if it be the case that, upon the true construction of ss. 458 and 459, the liability of the owners of the ship is not a general personal liability, but is limited to the value of the property saved, it must follow that the same construction will hold good as regards the liability of the own-

ers of the cargo; for in the 458th section, which creates the liability, no distinction is drawn between the nature of the liability of the owners of the ship and that of the owners of the cargo. But any doubts to which the words of the 459th section may give rise as regards the liability of the owners of the cargo are, in my opinion, removed by the language of the 468th section, which provides for the detention of the ship and the cargo and the apparel thereof, whenever any salvage is due in respect of services rendered in assisting such ship, or in saving the lives of the persons belonging to the same, and in saving the cargo or apparel thereof, thus following the three several services enumerated in s. 458. Why should the cargo be detained in a case in which there has been life salvage only, if the owners of such cargo are under no liability to pay or contribute to the amount due in respect of such life salvage?

*The 469th section also has the same bearing, for it [157 provides for the sale of any ship, cargo, or apparel which has been so detained, and for the payment of the amount due.

Upon the consideration of these several sections of the act, I am of opinion that the liability to pay a reasonable amount of salvage to life salvors is imposed upon owners of cargo as well as upon owners of the ship, and that such liability is not a general personal liability to be enforced in any circumstances whether the ship and cargo are lost or not, but a liability limited to the value of the property saved from destruction. The question remains, what is to be considered "property saved from destruction," and I am of opinion that, as regards the right of life salvors to claim a reasonable amount of salvage, it is immaterial whether the property saved from destruction has been saved by salvors, as the expression is ordinarily understood, or by other means. The words of the 458th section of the act, which creates the liability, appear to me to apply equally to the one class of property as to the other. Reliance has been placed upon the use of the word "salvage," as indicating that the claim must be in respect of property saved by "salvors" as recognized by the old law, and that no right was conferred by the act upon the life salvors against or in respect of any property which would not have been subject to claims for salvage under the old law. But having regard to the whole provisions and scope of the act of 1854 and of 9 & 10 Vict. c. 99, which preceded it, I do not think that the word was used in the 458th section in the limited sense suggested. Indeed the section appears to me to con-

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tain a clear indication of the contrary, for the owners of ships and cargo are made liable when any one of the three services are rendered, and, consequently, when life has been saved, and there has been no salvage, in the limited acceptance of the term, of either ship or cargo; and in the 459th section the word "salvage" is clearly used to measure the reward or compensation to which the life salvor is entitled in cases in which, by reason of the total loss of the ship, no claim for salvage could have been enforced under the old law. In the result, I am of opinion that it was the intention of the Legislature in passing the Merchant Shipping Act of 158] 1854, not only to give a legislative *sanction to the existing practice of indirectly rewarding salvors of life, when they were salvors of property also, but to remedy the injustice of the existing laws and practice, so far as they failed to provide reward for the saving of life, when unaccompanied by a saving of property, and that under the provisions of that act the owners of all property saved, whether ship, cargo, or apparel, and however saved, are rendered liable, to the extent of the value of the property saved, for a reasonable amount of salvage in respect of life saved, even though the life salvors have in no respect assisted in the salvage of either ship or cargo. If the views which I have expressed of the changes effected by the Merchant Shipping Act in the law of life salvage are correct, it would follow that in the present case the claim of the plaintiffs for salvage is well founded, and that the decision of the judge of the Admiralty Court should be affirmed.

It has been suggested, in the course of the argument, that the property recovered in the present case was "wreck." I do not think it was wreck within the meaning of the statute; but it appears to me to be immaterial to consider whether it was so or not—it was a portion of the property saved from destruction. If it was "wreck" a question might arise whether the claim of the life salvors was against more than the owners' interest in the "wreck," that is, whether it was not postponed to the fees of the receiver of wrecks, and possibly to other payments under the wreck clauses of the act. The value of the recovered portions of the cargo is however much more than sufficient to meet all those claims and demands, and it is immaterial to consider their respective priorities. Several cases have been cited in the course of the argument, but I do not think it necessary to refer to them further than to say that, in my opinion, they do not support any views opposed to those which I

have expressed. The case of *The Fusilier* (') is the one which has been most discussed. In that case assistance had been rendered by a lifeboat, by two luggers, and by a steaming; the services rendered by them were distinct, and were different in character. The luggers claimed in respect of assistance rendered to ship and cargo, and made no claim for saving life; the *lifeboat service was in saving [159 life alone; whilst the tug claimed both for saving life and for assistance rendered to ship and cargo; it was contended on behalf of the owners of cargo, that as regarded so much of the claim of the tug as was in respect of saving life, and as regarded the entire claim of the lifeboat, the liability to pay salvage was limited by the Merchant Shipping Act to the owners of the ship, but the Court of Admiralty in the first instance, and the Judicial Committee, on appeal, decided adversely to this contention, and salvage was awarded against the owners of cargo as well as against the owners of the ship. To this extent the same questions were raised as have been raised in the present case, and were decided adversely to the owners of cargo. In the views expressed by Dr. Lushington in the Court of Admiralty, and by Lord Chelmsford in the Privy Council, I entirely concur.

JAMES, L.J.: I also am of opinion that the judgment of the judge of the Admiralty Court ought to be affirmed. The act of Parliament, in plain words, says that a life salvor is to be paid salvage, and that such salvage is to be paid by the ship and cargo—the only fund from which it could be paid. The judgments of Dr. Lushington, affirmed by the Privy Council, have established this, that (notwithstanding some apparent difficulty raised by the succeeding sections) such salvage is not to be thrown exclusively on the ship, but is to be borne ratably by the ship and cargo. There is nothing in the act of Parliament which says, and nothing from which, in my opinion, it is reasonably to be implied, that the right of the life salvors is subject to a condition precedent, that some salvage service should be rendered by some one to the ship and cargo or either. No doubt the language of Dr. Lushington ('), is "saved the ship and cargo." The judgment does not say, and in my opinion could not have meant to say, "ship and cargo salvaged by the aid of a salvor." The word "saved" there means, according to my view of the language, that the ship and cargo has escaped from the peril in which it was and has come to shore, whether as wreck or otherwise. There is nothing unreasonable in making the owners of the ship and cargo pay

(') 1 Br. & L., 341; 3 Moo. P. C. (N.S.), 51.

(') 1 Br. & L., at p. 344.

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[160] for the *salvage of the lives on board, any more than there would be anything unreasonable in a law making a householder pay for the salvage of his inmates from a fire. But it would be more unreasonable to make the right of the life salvor to salvage depend on the fortuitous circumstance, that some other salvor unconnected with him had succeeded in rendering to ship or cargo salvage services unconnected with the life salvage. In the case of *The Coromandel* (') the life salvage was rendered to a boat-load of men who had escaped from the ship—the other salvage was rendered miles away and hours afterwards by a totally distinct body of salvors. In the case of *The Fusilier* (') some of the life salvors afterwards had something to do with the salvage of the ship and cargo, but that was a mere accident. The latter salvage service was of the slightest possible kind; and the owners of a boat, which had nothing whatever to do with that salvage, were decreed to participate in the life salvage paid by the ship and cargo.

This seems to me quite in accordance with reason and principle. If a ship is in distress and the persons who go to its rescue busy themselves, in the first instance, as they ought to do, exclusively with the salvage of lives, and while they are doing this by a change of weather a rising tide and a favorable breeze lift the ship and waft her into a safe cove, surely it is quite as reasonable and right that the ship and cargo, saved by the aid of God, and without further expense, should pay the life salvors as if they had been saved by a steam-tug coming up at the critical moment, or by some other salvage services for which they would have further to pay. In this case the ship was not saved, but the cargo was saved, that is to say, it remained in a place to which the owners had access and from which they were able to get it; and it appears to me to make no difference that the bullion has been brought to the surface by divers paid by the owner.

Doubtless in estimating the value of the service a large deduction might have to be made—a very liberal allowance, for the fact that the owners had to pay for somewhat special and speculative services in realizing it. But there can be no doubt in this case that, with every possible allowance on [161] this head, the value of the *cargo was very large indeed—so large that the amount of salvage awarded appears to be a moderate percentage.

I base my decision on the words of the statute as they would be understood by plain men who know nothing of

(') Swab., 205.

(') 3 Moo. P. C. (N.S.), 51; 1 Br. & L., 341.

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the technical rule of the Court of Admiralty, or of flotsam, lagan and jetsam. The Legislature tells mariners that if they exert themselves to save life, they shall receive reward on the principle of salvage, and to put a technical meaning on the words, so as to limit the operation of the enactment, would be "to keep the word of promise to the ear and break it to the hope."

Judgment for the plaintiffs affirmed.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Waltons, Bubb & Walton.*

[2 Probate Division, 168.]

April 17; June 2, 1877.

[IN THE COURT OF APPEAL.]

*THE FRANCONIA⁽¹⁾. (J. 67.)

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Collision at Sea—Jurisdiction of Court of Admiralty to entertain Proceedings in rem against a Ship for Damages for Loss of Life—9 & 10 Vict. c. 93, s. 2—"Damage done by any Ship"—Admiralty Court Act, 1861 (24 Vict. c. 10), s. 7.

An action was instituted against a foreign ship to recover damages for the death of the husband of the plaintiff alleged to have been caused by a collision brought about by the improper navigation of the ship proceeded against:

Held, that the court had jurisdiction to entertain the action, and on appeal this decision was affirmed by James and Baggallay, L.JJ. (Bramwell and Brett, L.JJ., dissenting).

THIS was an action of damage instituted, on the 12th of February, 1877, on behalf of Ann Jefferey, the widow of James Jefferey, against the German steamship *Franconia*. The indorsement on the writ in the action was in terms as follows: The plaintiff, as administratrix of James Jefferey, claims the sum of £1,000 against the steamship or vessel *Franconia* for damages for the death of the said James Jefferey and loss of his goods, occasioned by a collision which took place in the Straits of Dover, between the *Franconia* and the *Strathclyde*, on which he was a mariner, in the month of February last, caused by the negligence of those on board the *Franconia* ⁽²⁾.

An appearance under protest on behalf of the owners of the *Franconia* was entered in the action on the 15th of March last ⁽³⁾.

⁽¹⁾ See note 19 Eng. R., 367.

⁽²⁾ See *The Franconia* (2 P. D., 8), *The Queen v. Keyn* (2 Ex. D., 68), and *Harris v. The Hamburg-Amerikanische Packet-fahrt-Actien-Gesellschaft, Owners of The Franconia* (2 C. P. D., 178).

⁽³⁾ The *Franconia* was never arrested in the action, but she had been arrested in another action for damage done to the *Strathclyde*, and she was released on the owners, through their solicitors, giving an undertaking to give bail to answer

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March 24. *W. G. F. Phillimore* (Benjamin, Q.C., with [164] him), *appeared for the defendants under protest, and moved the judge in court to set aside so much of the writ of summons issued in the action as claimed damages for loss of life. This Division of the High Court has no greater jurisdiction *in rem* than the Court of Admiralty had before the passing of the Judicature Acts⁽¹⁾. The only question, therefore, is whether the latter court ever possessed jurisdiction to entertain a claim for damages for loss of life. This question the defendants contend can only be answered in the negative. The decisions of this court in the cases of *The Sylph* ⁽²⁾, *The Guldaxe* ⁽³⁾, and *The Explorer* ⁽⁴⁾, and the judgment of the Judicial Committee of the Privy Council, in the case of *The Beta* ⁽⁵⁾, cannot be reconciled with the language of the judges of the Court of Queen's Bench in the subsequent case of *Smith v. Brown* ⁽⁶⁾. Not only is the decision in that case an express authority in favor of the defendants, but the principles there laid down with respect to the limited jurisdiction possessed by the Court of Admiralty have been more recently approved in other cases coming before the superior courts of common law: *James v. London and South Western Ry. Co.* ⁽⁷⁾; *Simpson v. Blues* ⁽⁸⁾. The Legislature never could have intended either that compensation for loss of life should be assessed otherwise than by a jury, or that the owners of a foreign ship should be liable in this country to an action to recover damages for loss of life occasioned by a collision on the high seas.

Butt, Q.C., and *E. C. Clarkson*, for the plaintiffs, opposed the motion: The language used in the judgment of the Judicial Committee of the Privy Council in *The Beta* ⁽⁵⁾ is wide enough to support the jurisdiction of the court. The decisions of the Judicial Committee have always been regarded with the greatest deference by all the courts in Westminster Hall: *General Steam Navigation Co. v.*

judgment in any actions for loss of life or personal injury that might be thereafter instituted by plaintiff's solicitors against the vessel, without prejudice, however, to any objections the owners of the *Franconia* might thereafter raise in respect of any claim against the said vessel for loss of life or personal injury.

⁽¹⁾ See the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 11, subs. 3.

⁽²⁾ Law Rep., 2 A. & E., 24.

⁽³⁾ Law Rep., 2 A. & E., 325.

⁽⁴⁾ Law Rep., 3 A. & E., 289. In this

case there was an appeal to the Judicial Committee of the Privy Council. Before the appeal came on to be heard the Court of Queen's Bench had given judgment in *Smith v. Brown* (Law Rep., 6 Q. B., 729). The judicial committee thereupon [Feb. 2, 1872] directed the hearing of the appeal to stand over, and no further proceedings were ever taken.

⁽⁵⁾ Law Rep., 2 P. C., 447.

⁽⁶⁾ Law Rep., 6 Q. B., 729.

⁽⁷⁾ Law Rep., 7 Ex., 187.

⁽⁸⁾ Law Rep., 7 C. P., 290.

British and Colonial Steam Navigation Co. ('), and were absolutely binding upon the Court of Admiralty. No doubt the decision of one of the superior courts of common law on a case coming before it on prohibition, so far as that particular case is concerned, is binding on the court prohibited; but in the present case there can be of course no question of a prohibition. The court therefore ought to adhere to the opinions expressed by the present judge of the Court of Admiralty in *The Guldaxe* ('), and *The Explorer* ('), more especially as *Smith v. Brown* (') is merely the decision of a court of first instance. It is not unreasonable to suppose that the Legislature intended to confer jurisdiction in cases similar to the present on the Court of Admiralty; for if this court has not jurisdiction to entertain a claim for damages for loss of life, there is, as the law is at present settled, no other court in the kingdom where such damages can be recovered from foreign shipowners not within the jurisdiction: *Harris v. Owners of The Franconia* ('). This court has undoubted jurisdiction in suits for limitation of liability of the defendant in a cause of damage for personal injury, but in such cases no jury has ever been summoned: Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 505, 514, 515; Richardson's Dict., Damage; Admiralty Court Act, 1861 (24 Vict. c. 10), s. 13; *The Ruckers* ('); *The Alexandria* (').

Phillimore in reply: The decisions of the Judicial Committee of the Privy Council are not binding on the High Court: *Merchant Shipping Co. v. Armitage* (').

Cur. adv. vult.

April 17. SIR ROBERT PHILLIMORE: In this case Ann Jefferey, the widow and administratrix of James Jefferey, deceased, claims the sum of £1,000 against the steamship or vessel Franconia, for damages for the death of the said James Jefferey and loss of his goods, occasioned by a collision which took place in the Straits *of Dover be- [166
tween the Franconia and the Strathclyde, on which he was a mariner, in the month of February, in last year, the collision being caused by the negligence of those on board the Franconia. The defendants, the owners of the Franconia, now move the court to set aside so much of the writ of summons issued in this action as claims damages for loss of life. It is not disputed that the court has jurisdiction, so far as damages for the loss of goods are concerned; but two ques-

(1) Law Rep., 3 Ex., 330.

(2) Law Rep., 2 A. & E., 325.

(3) Law Rep., 3 A. & E., 289.

(4) Law Rep., 6 Q. B., 729.

(5) 2 C. P. D., 173.

(6) 4 C. Rob., 73.

(7) Law Rep., 3 A. & E., 574.

(8) Law Rep., 9 Q. B., 99.

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tions appear to be raised in these proceedings, first, whether the court can entertain an action for damages on account of the death of a party; and, second, whether the claimant may proceed *in rem*, that is, against the ship for such damages. The ship was not arrested in this action, but when she was arrested in other actions it was agreed that she should be released on certain terms, which made it necessary for the defendants to appear and give bail in this action. These terms were, first, £8 per ton to be paid into court on the registered tonnage of the ship; second, bail to be put in in two other actions; and, third, the owners of the Franconia to appear and give bail in every action for loss of life and personal injury (¹). The case is to be considered as if the ship was under arrest, and the proceedings were *in rem*, the right being reserved to contest the jurisdiction. The 7th section of the 24 Vict. c. 10 (the Admiralty Court Act, 1861), is as follows: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." The construction of this section has been the subject of much litigation, and unfortunately of conflicting decisions. The 9 & 10 Vict. c. 93 and 27 & 28 Vict. c. 95, s. 2, first created the right of action at common law for compensating the families of persons killed by accident. These acts did not confer jurisdiction in this matter upon the High Court of Admiralty. It is the 7th section of the 24 Vict. c. 10, to which I have just referred, which conferred, if any section of any act did confer, such jurisdiction upon that court.

I think it right to observe *in limine*, that in certain cases it is clear that the Court of Admiralty would have had jurisdiction to award and distribute damages for loss of life or personal injury happening in a collision. The Merchant [67] Shipping Act, 1854, s. 514, *gives jurisdiction in such a matter to the Court of Chancery and other courts, and the Admiralty Court Act, 1861, s. 13, confers the same jurisdiction on the High Court of Admiralty when the ship or proceeds are under arrest; and, as I observed in the case of *The Guldfaxe* (²), it is clear, therefore, that if in this very case of damage there had been several claimants, including the present plaintiff, and if the defendants had instituted a suit in this court for the purpose of limiting the amount of their liability, and for the distribution of such amount ratably amongst the claimants, it would have been the duty of the court to have entertained the suit.

(¹) See *Harris v. The Hamburg-Amerikanische Packetfahrt-Actien-Gesellschaft* (Law Rep., 2 C. P. D., 173).

(²) Law Rep., 2 A. & E. 325.

I will now briefly refer to the principal judgments on this subject.

In the case of *The Sylph* ⁽¹⁾, decided in 1867, I ruled, following the opinion of Dr. Lushington, that the Court of Admiralty had jurisdiction under the Admiralty Court Act, 1861, to entertain a cause for personal damage done by a ship, and I stated my reasons. This judgment was not appealed from. In the following year, 1868, I again had occasion to consider the question, and stated my reasons at length for considering that the same court had jurisdiction to entertain a suit for the recovery of damages by the personal representative of a person killed in a collision between two vessels.

In 1869, in the case of *The Beta* ⁽²⁾, I again held that this court had jurisdiction in a cause of damage instituted against a ship for personal damage. From this judgment an appeal was prosecuted to the Judicial Committee of the Privy Council in 1869, and that court, consisting of Lord Romilly, Sir W. Erle, Sir James Colville and Sir Joseph Napier, said: "The words of the 7th section of the Admiralty Court Jurisdiction Act, 1861, which had been referred to, clearly include every possible kind of damage. Personal injuries are undoubtedly within the words 'damage done by any ship.' The case of *The Sylph* ⁽³⁾, which has been referred to, and in which it was so held, has not been appealed from." In 1870, in the case of *The Explorer* ⁽⁴⁾, I entertained a suit brought against a foreign ship by the personal representative of persons killed in a collision. There was, *I believe, an appeal to the Privy [168 Council, but it was never prosecuted; and if the cases on this subject ended here, I should have no difficulty in reaffirming the principle laid down by Dr. Lushington, myself, and the Judicial Committee of the Privy Council. But in the case of *The Black Swan* ⁽⁵⁾, in 1871, where injury and death had been caused by a collision at sea and the suit had been entertained by this court, an application was made to the Court of Queen's Bench for a prohibition, which was granted: *Smith v. Brown* ⁽⁶⁾. I need not say that to such a court it is my inclination, as well as my duty, to pay the highest possible respect; but the unfortunate conflict between the judgment pronounced when the prohibition was granted and the judgment of the Judicial Committee of the Privy Council in the case of *The Beta* ⁽⁷⁾, compels me to

⁽¹⁾ Law Rep., 2 A. & E., 24.

⁽²⁾ Law Rep., 2 P. C., 447.

⁽³⁾ Law Rep., 3 A. & E., 289.

21 ENG. REP.

⁽⁴⁾ Not reported.

⁽⁵⁾ Law Rep., 6 Q. B., 729.

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consider the circumstances attending the proceedings before the learned judges of the Court of Queen's Bench and the grounds upon which their decision was founded. The case was heard before Lord Chief Justice Cockburn, Mr. Justice Hannen, and Mr. Justice Blackburn. The latter learned judge said: "I have entertained doubts in this case, not altogether removed, but which are not strong enough to make me dissent from this judgment, or even to make me require further time for consideration." The Lord Chief Justice and Mr. Justice Hannen considered the question "one of considerable difficulty," but decided in favor of the prohibition.

It appears to me that the main ground, I will not say the *ratio decidendi* of the Lord Chief Justice's judgment, was that the word "damage" was used as applicable to mischief done to property, and not to injuries done to the person; and his Lordship said, "And that this distinction is not a matter of mere verbal criticism, but is of a substantial character and necessary to be attended to is apparent from the fact that the Legislature in two recent acts *in pari materia*, both having reference to the liability of ship-owners in respect of injury or damage, namely, the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, part ix). and the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63, s. 54), has, in a series of sections, care-
[69] fully observed this distinctive phraseology, *speaking in distinct terms, in the same section, of loss of life and personal injury on the one hand, and loss and damage done to ships, goods, or other property on the other. In those acts the term 'damage' is nowhere used as applicable to injuries done to the person; it is applied only to property and inanimate things. We see no reason to suppose that the Legislature, in using the term in the enactment we are considering, had lost sight of the distinction uniformly observed in the preceding statutes" (').

The Merchant Shipping Act contains no less than 548 sections, and I venture to think that a close inspection of the language of the various clauses will show that this sharp distinction between damage and injury can hardly be maintained, but that, as was admitted by the counsel for the defendants, damages and injury are sometimes interchangeably used. Certainly in the 527th section injury to property is spoken of, and in ss. 505 and 515 the words loss or damage must apply to all the cases mentioned in s. 504, among which are "loss of life and personal injury." It is

(') Law Rep., 6 Q. B., 729, 732.

also to be observed that the Court of Queen's Bench seem to distinguish between the deference due to the Judicial Committee of the Privy Council, as an appellate tribunal, and that due to it on a question of prohibition (*). It is in the former character that I have to consider it.

It is not improper, perhaps, to remark in this place that the High Court of Admiralty had jurisdiction in the matter of a personal assault committed on the high seas by a master upon a passenger. The action in such a suit was always described as in a cause of damage. The decision of Lord Stowell on this subject will be found in the case of *The Ruckers* (*).

Lastly, I think it worthy of consideration that the 7th and 13th sections of the Admiralty Court Act, 1861, must be read together, and then the result is that the High Court of Admiralty had jurisdiction over any claim for damage done by any ship, and that whenever any ship or the proceeds were under arrest in that court it had the same jurisdiction that the Court of Chancery had by that section of the Merchant Shipping Act, 1854, to which I have already adverted in the beginning of this judgment.

*Upon the whole, I think it is my duty to adhere [170 to the decision of the Privy Council in the case of *The Beta* (*), and to reject the motion.

The defendants appealed.

May 2. *Benjamin*, Q.C., *Cohen*, Q.C., *W. G. F. Phillimore* and *Stubbs*, for the defendants.

Butt, Q.C., and *E. C. Clarkson*, for the plaintiff.

The arguments and cases cited were the same as in the court below.

Cur. ado. vult.

June 2. The following judgments were delivered:

BRAMWELL, L.J.: This is the judgment of my Brother Brett and myself. We are of opinion that this appeal should be allowed; that the Admiralty has no jurisdiction *in rem* in a case in which the right of action is under 9 & 10 Vict. c. 93. We offer no opinion as to whether it would have jurisdiction in a case of personal hurt where there was no death and the person hurt was the plaintiff. We proceed on the ground that an action given by 9 & 10 Vict. c. 93, is not within the words and meaning of the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 7.

The Legislature, it is true, has given power to the Court

(*) Law Rep., 6 Q. B., 729, 736.

(*) 4 C. Rob., 73.

(*) Law Rep., 2 P. C., 447.

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of Admiralty to assess and apportion the damages in such cases under certain circumstances under the Merchant Shipping Acts, and in such case it necessarily follows that the machinery of a jury was dispensed with. It is true that a jury can now be had in the Admiralty Division, and, as Mr. Butt pointed out, that the word "damage," in s. 7 of 24 Vict. c. 10, includes damage done to goods. It is also true that under the Judicature Act any action *in personam* may, as matter of jurisdiction, be brought in the Admiralty Division as well as in any other, yet looking at the terms of Lord Campbell's Act (9 & 10 Vict. c. 93) and of s. 7 of the Admiralty Court Act, 1861 (24 Vict. c. 10), and construing them as if at the time the latter was passed, we are of opinion that s. 7 of the latter act gives no jurisdiction *in rem*, which is the question now under discussion. Lord 171] Campbell's Act is *express; it says: "The jury may give such damages as they may think proportioned to the injury, and the amount shall be divided in such shares as the jury by their verdict shall find and direct." As to the words "the jury may give," that might possibly be held to mean, jury, where there was a jury, and court, where there was not; I do not say it could be, but whether or no, we are of opinion that under that section it must be a jury who find and direct the division into shares. The words are express. Suppose Lord Campbell's Act had said that such actions should only be brought in a court where there was a jury, would the 7th section of the Admiralty Court Act, 1861, have repealed that? But it does say so in effect, and the argument is that it is repealed. Suppose that the relations had assigned their right of action, could the assignees have maintained a suit in equity? Would an action lie in the county court without a jury? No; the jury is essential.

It is remarkable that no jurisdiction is given in a case of bodily hurt to a passenger, nor to his goods for injury done in the ship; and we think there is great weight in the argument that the words of the Admiralty Court Act, 1861, s. 7, are not apt words to include a case under Lord Campbell's Act. Such a claim as this is neither popularly or strictly speaking a claim for damages done by a ship. It is a claim for compensation for loss sustained partly by a death caused by a ship, and partly by something else which may or may not happen as well as the death, but which must also happen in order to substantiate a claim for relief. It is a claim not proportioned to the act done, and its immediate consequences, if the act relied on be the act done by the ship, but

to the result of that act and other circumstances, namely, the death of the person killed and his not having himself before the death sued, and the circumstances of his relations and of their and his property and his disposal of it. Though we have thought it right to make the above remarks, of course we avail ourselves of the judgment and reasons in *Smith v. Brown* (¹), especially of the difficulty arising from the difference between the admiralty and common law rule as to contributory negligence. Now the admiralty rule *must [172 be given up, or an action given where Lord Campbell's Act gives no action.

We are of opinion that the appeal should be allowed.

BRETT, L.J., read the judgment of BAGGALLAY, L.J., in which JAMES, L.J., concurred.

Ann Jefferey, the plaintiff in the action in which this appeal is brought, is the widow and administratrix of one James Jefferey, who was a mariner on board the steamship *Strathclyde*, and was killed in the collision between that vessel and the *Franconia*, in the Straits of Dover on the 17th of February, 1876.

The action is brought by Mrs. Jefferey, as administratrix of her deceased husband, to recover damages against the *Franconia* for his death, and for the loss of his goods. The writ was issued on the 12th of February, 1877, and thereupon the owners of the *Franconia* moved to set aside so much of the writ as claimed damages for loss of life. This motion was refused by the Admiralty Division, and from such refusal the present appeal is brought.

Both in the Admiralty Division and upon the hearing of the appeal, the case of the appellants was based upon the contention that the Admiralty Division had no jurisdiction to entertain a claim for damages in respect of loss of life; and the substantial question for decision is whether the Court of Admiralty, previously to the coming into operation of the Judicature Acts had jurisdiction to entertain any such claim; for notwithstanding the general transfer of jurisdiction to the High Court of Justice it is provided by subs. 3 of s. 11 of the Judicature Act of 1875, that no person shall assign any cause or matter to the Admiralty Division unless he would have been entitled to commence the same in the Court of Admiralty if that act had not passed.

It is admitted that if the Court of Admiralty had any such jurisdiction it was conferred upon it by the Admiralty

(¹) Law Rep., 6 Q. B., 729.

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Jurisdiction Act, 1861 (24 Vict. c. 10), s. 7 of which enacts that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." The question whether the term "damage," as used in that section is applicable to injury to the person as well as injury to property, has been the subject of frequent discussion and of conflicting decisions; the Court of *Admiralty, in the case of *The Sylph* (*), held that it had jurisdiction to entertain a claim for damages in respect of personal injury, not resulting in death, and the view was adopted by the Judicial Committee of the Privy Council in the case of *The Beta* (*), and in the case of *The Guldaxe* (*), the Court of Admiralty held that it had a like jurisdiction in respect of loss of life occasioned by a collision.

On the other hand the Court of Queen's Bench in the case of *Smith v. Brown* (*), expressly dissented from the decision of the Judicial Committee of the Privy Council in the case of *The Beta* (*), and held that personal injury occasioned by the collision of two ships was not included in the term "damage," as used in s. 7 of the Admiralty Court Act, 1861, and that the Court of Admiralty had no jurisdiction to entertain a claim for damages in respect of personal injury resulting in death; and a general concurrence in this decision of the Court of Queen's Bench has been expressed by the Court of Common Pleas in the case of *Simpson v. Blues* (*), and by the Court of Exchequer, and on appeal by the Exchequer Chamber in the case of *James v. London and South Western Ry. Co.* (*); but in neither of these cases did the question turn upon the construction of 24 Vict. c. 10, s. 7. I am unable to concur in the construction of the Admiralty Court Act, 1861, which has been so adopted by the Court of Queen's Bench, and apparently concurred in by the other courts to which I have just referred; it appears to me that the view taken by the Court of Admiralty and by the Judicial Committee of the Privy Council is the more correct.

The words of the 7th section of the Admiralty Court Act, 1861, are perfectly general. Taken by themselves, they would appear to confer a jurisdiction upon the Court of Admiralty to entertain all claims in respect of damage done by a ship, whatever may be the nature of the damage, whether to person or to property; there is nothing in the context of the section to suggest that the word "damage" should be limited in its meaning, and the statute being remedial of a

(*) Law Rep., 2 A. & E., 24.

(*) Law Rep., 6 Q. B., 729.

(*) Law Rep., 2 P. C., 447.

(*) Law Rep., 7 C. P., 290.

(*) Law Rep., 2 A. & E., 325.

(*) Law Rep., 7 Ex., 187; in error, 287.

grievance should receive a liberal, rather *than a narrow, construction: this principle was acted upon by Dr. Lushington in the case of *The Bahia* (¹), and by the Judicial Committee in the case of *Dapuetto v. Wyllie* (²). We have only to look at the sections of the act which follow the 7th section to see that it was the intention of the Legislature to give to the Court of Admiralty an extended jurisdiction to enable it to do complete justice in the cases which might come under its consideration. Sect. 13 in particular, confers a jurisdiction under which in many cases, it would be necessary that the Court of Admiralty should assess the amount of damages in respect of loss of life or personal injury, and the nature of the jurisdiction conferred by this section (to which I shall have occasion to refer again presently) appears to me to negative any construction of the act which would limit the jurisdiction thereby conferred to the same subject-matters as were previously under its cognizance, a view of the case which has been suggested in the course of the argument: It is further to be observed that if s. 7 is to receive the limited construction which has been suggested, it is difficult to understand why it was introduced into the act, seeing that, in such case, the extension of the jurisdiction would have been of a very trifling character, as the Court of Admiralty already had undoubted jurisdiction in respect of damage to property occasioned by collision.

It has, however, been urged on the part of the appellants, that, notwithstanding the general terms in which 24 Vict. c. 10, s. 7, is expressed, the word "damage" as used in it ought, for reasons which will be presently mentioned, to be limited in construction to damage done to property, or at any rate that it ought not to be construed so as to include loss of life.

As similar arguments found favor with the Court of Queen's Bench in the case of *Smith v. Brown* (³), and have been adopted by the other courts to which I have referred, and as two of my colleagues think that our decision in the present appeal ought to be in favor of the appellants, I proceed to express my opinion upon the points so pressed upon us; and I do so with much diffidence, differing as my opinion does from the opinions of those for *whose knowl- [175 edge and experience I entertain the most profound respect, and in differing from whom I cannot but entertain doubt as to the correctness of my own conclusions. In support of the view that the word "damage," as used in s. 7 of the

(¹) Br. & Lush., 61.

(²) Law Rep., 5 P. C., 432.

(³) Law Rep., 6 Q. B., 729.

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Admiralty Court Act, 1861, should be limited in construction to damage to property, it is contended that, not only is there no legislative sanction for the use of the word as denoting injury to the person, but that the Legislature has, in other recent acts *in pari materiâ*, adopted the use of the word "damage" as applicable exclusively to injury to property, and that it must be assumed that the Legislature, in passing the act in question, did not lose sight of the distinction which it had recognized in its other enactments. If the facts were so, I should feel very strongly the force of the arguments based upon them, but I do not so read the Merchant Shipping Act, 1854 and 1862, which are the statutes to which reference has been made; the latter statute it will be observed, was passed after the Admiralty Court Act, 1861.

It is quite true that in the sections of the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104), which have reference to the limitation of the liability of shipowners, the expressions "loss of life" and "personal injury" are used with reference to injury to the person, whilst the word "damage" is used with reference to injury to property; but under the provisions of these sections a different scale of liability was fixed in respect of injuries to the person from that in respect of injury to property, and it was convenient (though I admit not necessary) to use different forms of expression to distinguish one kind of injury from the other; but if s. 7 of the Admiralty Court Act, 1861, was intended to apply to injury to the person as well as to injury to property, there was neither necessity for using, nor any convenience in using more than one expression to denote both kinds of injury.

But this limited use of the word "damage" is not observed throughout the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104). In s. 515 the words "loss or damage" are used in reference to three classes of injury, and as the word "loss" would be clearly inapplicable to personal injury not resulting in death, the word "damage" must in this section have reference to personal injury as well as to injury [76] to property. Again, if we turn to s. 299 *of the same statute, which is the last of a series of sections enacting various rules for the prevention of accidents, we find that it commences with the words, "In case any damage to person or property arises from the non-observance by any ship of any of the said rules." Here we have a clear and unquestionable use of the "damage" in a sense applicable to injury to person as well as to property. And in s. 527 we find the expression "injury to property," which is suggestive at least of the words damage and injury being to some extent inter-

changeably used. And so, again, in the other act referred to, the Merchant Shipping Act of 1862, whilst, on the one hand, we find the expressions "loss of life," "personal injury," and "damage to property," used in the sections modifying the provisions of the act of 1854 as to the liability of the shipowners, we, on the other hand, find in s. 28 the expression "damage to person or property" applied to injuries occasioned by breaches of the regulations therein referred to. So far, then, from there being no legislative sanction for the use of the word "damage" as denoting injury to the person, and from the Legislature having adopted the use of the word as exclusively applicable to property, it appears to me that the very statutes referred to as supporting these propositions, afford intrinsic evidence to the contrary. And here I would refer to a statement made by Sir R. Phillimore, in the course of his judgment in this case in the Admiralty Division, and which appears to be borne out by the report of the case of *The Ruckers* (¹), before Lord Stowell, to the effect that an action commenced in the Court of Admiralty in respect of a personal assault committed on the high seas by the master of a ship on a passenger was, previously to the act of 1861, always described as "a cause of damage." But the further argument remains to be considered, viz., that assuming that it cannot be maintained that such a limited meaning as has been suggested ought to be given to the word "damage" by reason of the legislative use of the word in the Merchant Shipping Acts, the meaning of the word ought nevertheless not to be so extended as to include "loss of life." The argument is based upon the provisions of Lord Campbell's Act (9 & 10 Vict. c. 93), and it is contended that, inasmuch as the right of action created by that act *and extended or modified by the subsequent statute [17 27 & 28 Vict. c. 95, for obtaining compensation for the families of persons killed by accident, was confined to actions brought in the courts of common law, and that great practical inconvenience and possible injustice might arise from the exercise by the Court of Admiralty of jurisdiction in such matters, it is impossible to suppose that the Legislature intended, under a general statute such as that which we are now considering, to effect so great a change in the rights and relative positions of the parties to such actions.

In support of this view it has been urged that the transfer of jurisdiction to the Court of Admiralty would not only deprive the parties of the common law procedure and the mode of trial pointed out by the act, but might also materi-

(¹) 4 C. Rob., 78.

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ally affect their relative rights, having regard to the fact that the Court of Admiralty, in dealing with claims for damage arising from collision, acts upon principles unknown to the common law, as, for instance, dividing the loss where both parties are to blame. It is quite possible that some such inconveniences as those suggested might have arisen from an exercise by the Court of Admiralty of the jurisdiction in question, or may arise from an exercise of the like jurisdiction by the Admiralty Division; though, having regard to subs. 9 of the 25th clause of the Judicature Act of 1873, I much doubt whether any such conflict between the civil law and the common law as was suggested by Lord Blackburn in *Smith v. Brown* ⁽¹⁾ could arise after that act came into operation; but however this may be, the Legislature has thought fit to enact, that under other circumstances of a similar character and at least as likely to occur, similar inconveniences must be submitted to. The right of action given by Lord Campbell's Act has in certain cases been modified and restricted by the sections of the Merchant Shipping Acts already referred to, and the jurisdiction for assessing the amount of damages in such cases as regards injury to the person as well as injury to the property, has been transferred to the Court of Chancery; and, by s. 13 of the Admiralty Jurisdiction Act, 1861, the jurisdiction which, by part 9 of the Merchant Shipping Act, 1854, was conferred upon the Court of Chancery, *has been extended to the Court of Admiralty whenever the ship, or the preceeds thereof, are under arrest. In this very case, though the ship was not arrested in the action, she had been arrested in other actions, and, as I understand the facts, it was agreed that the case should be treated and dealt with as if she were under arrest and the proceedings were *in rem*; but however this may be, she might have been under arrest, and if she had been, the Admiralty Division would have been bound, under 24 Vict. c. 10, s. 13, to entertain an action at the instance of the owners of the ship for the distribution of the amount of their liability ratably amongst the claimants, and in such case to assess the amount of damages payable to the plaintiff, and to ascertain the proportions thereof payable to the different members of Jefferey's family.

Every inconvenience and every injustice which has been suggested as likely or possible to occur if the present action had been brought in the Court of Admiralty would or might equally arise in such an action as has been last suggested.

(1) Law Rep., 6 Q. B., 729.

It appears to me, therefore, that the argument based upon the probability or possibility of such practical inconvenience or injustice cannot be maintained.

Upon the whole, I am of opinion that the judgment of the Admiralty Division should be affirmed.

The Court being equally divided, the judgment of the court below stands.

Solicitors for plaintiff: *Gellatley, Son & Warton.*

Solicitors for defendants: *Stokes, Saunders & Stokes*

[2 Probate Division, 179.]

March 21, 1877.

*THE ANNANDALE ('). (G. 343.)

[179

Forfeiture—Intent to conceal British Character of British Ship—Sale to bona fide Purchaser for Value after Offence Committed, but before Seizure by the Crown—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 103, subs. 2.

A cause of forfeiture, under the 103d section of the Merchant Shipping Act, was instituted on behalf of a British officer of customs against a vessel seized for an alleged infringement of the provisions of that section. The plaintiff in his statement of claim in effect alleged that on the 18th of July, 1874, one of her owners, being a British subject, had falsely represented, contrary to the fact, and with intent to conceal the British character of such ship, that she had been sold to foreigners. An appearance in the action having been entered on behalf of a foreigner as defendant, a statement of defence and counter claim was delivered on his behalf, which in the 7th paragraph thereof set up the defence, that on the 6th of July, 1876, the defendant became *bona fide* purchaser of the vessel proceeded against, for valuable consideration, without knowledge of any of the matters alleged in the statement of claim. The plaintiff demurred to the 7th paragraph of the statement of defence.

The court sustained the demurrer, and held that the property in the vessel proceeded against was divested out of its former owners, and vested in the Crown immediately on the commission of any of the offences in respect of which, under the provisions of the section, the penalty of forfeiture was imposed.

THIS was a cause of forfeiture under the provisions of the 103d section of the Merchant Shipping Act, 1854, instituted on the 10th of July, 1876, against the bark Annandale.

On the 28th of July, 1876, an appearance as defendant was entered in the suit on behalf of Hans Lows, described as owner of the *Annandale* (').

On the 18th of August the statement of claim was delivered in the action. It was, so far as material, substantially in terms as follows:—

(¹) Affirmed, *post*, p. 604.

(²) Subsequently, on the 28th of November last, the judge in court gave leave to the plaintiff to add William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison and William Hepple, as

defendants in the action, and on the 2d of February in this year an appearance was entered for William Hepple, but up to the date of this report no further steps appear to have been taken in the action on behalf of such last-mentioned defendant.

1. The plaintiff was, on and before the 18th of July, 1874, and has ever since been, and still is, a British officer of customs within the intent and meaning of the 103d section of the Merchant Shipping Act, 1854.

180] *2. Before and on the 18th of July, 1874, the bark or vessel Annandale was, within the true intent and meaning of the said act, a British vessel, and was registered at the custom house at Newcastle-on-Tyne as a British ship, in the names of William Perlee Livingston, William Pearson, Henry James Livingston, Thomas Watson, William Harrison and William Hepple, as owners thereof.

3. The said W. P. Livingston, W. Pearson, H. J. Livingston, T. Watson, W. Harrison and W. Hepple, who are respectively natural-born British subjects, were, before and on the said 18th of July, 1874, owners of the said bark.

4. On the 18th of July, 1874, the said W. P. Livingston, acting for and on behalf of himself and his said co-owners, and with their authority, and in order that the register of the said bark might be closed as upon a sale of the said bark to foreigners, represented to the registrar of British ships at the custom house, Newcastle-upon-Tyne aforesaid, such person being a registrar entitled by British law to inquire into the character of the said bark, that the said bark had been sold to foreigners, and that the said bark was at sea, but that her register (meaning thereby her certificate of registry) would be handed to the said registrar on her arrival.

5. The said registrar, in pursuance and in consequence of such representation as in the last paragraph mentioned, on or about the 28th of July, 1874, closed the said register, and the said bark ceased to be registered as a British ship.

6. The said bark had not, on or before the 18th of July, 1874, been sold to a foreigner or foreigners, and the representation so made as aforesaid by the said W. P. Livingston was false; the said bark, before and on the said 18th of July, 1874, was subsequently, and continued to be, owned by the said owners respectively named, and on such day, and subsequently thereto, she was and continued to be a British ship within the true intent and meaning of the 103d section of the said act.

7. On or subsequently to the said 18th of July, 1874, the said W. P. Livingston and his said co-owners hereinbefore named procured, or caused or permitted to be procured and carried on board the said bark a document or foreign certificate of registry known as a *lettre de mer provisoire*, by which it was stated and represented that the said bark had been bought by one Henry Thomas Watson, of Antwerp, and that she was then a Belgian ship.

8. The said statements and representations in the said document lastly mentioned were untrue, and the said bark, as therein stated, had not been bought by the said H. T. Watson, nor was she then a Belgian ship; but she was then and long after such document was procured or caused to be procured as aforesaid, and continued to be, a British ship within the true intent and meaning of the 103d section of the said act, and owned by the said W. P. Livingston and his said co-owners hereinbefore named of one or of more of them.

9. On or about the 19th of September, 1874, the said W. P. Livingston and his co-owners hereinbefore named, although the said bark continued to be and then was a British ship within the true intent and meaning of the act, procured or caused to be permitted or procured at Newcastle aforesaid a certificate of British tonnage for the said bark as for a foreign vessel belonging to Antwerp in the kingdom of Belgium.

10. On the 6th of July, 1876, one John Stephens, the then master of the said bark, by and with the knowledge and the permission of the said W. P. Livingston and his co-owners hereinbefore named, and of the other persons or 181] *person, if any, then being owners or owner of the said bark, made a report to the plaintiff at Liverpool, or to his deputy and representative respectively, being persons entitled by British law to inquire into the character of the said bark, by which report the said J. Stephens, as such master, stated and represented that the country to which the said bark belonged was Antwerp, meaning thereby Belgium, such statement and representation was untrue. The said bark was and continued to be a British ship within the true intent of the

said 103d section, and owned by the said W. P. Livingston and his co-owners hereinbefore mentioned, or some or one of them, or by one of them, or some of them conjointly with some other person or persons whose names are not known to the plaintiff, was sailed by or with the permission of the said W. P. Livingston and his said co-owners hereinbefore named, and such other person or persons as aforesaid as were then her owners, or by such of them as were then her owners under a foreign flag, to wit, the Belgian flag.

12. The said several matters and things hereinbefore alleged to have been done by the said W. P. Livingston and his co-owners hereinbefore named, or some or one of them, or by one or some of them conjointly with such other persons or person as aforesaid, caused or permitted to be done, or some or one of such matters and things, were respectively matters or things, or a matter or a thing, done or permitted to be done by the owners or owner of the said British bark Annandale, with intent to conceal the British character of the said bark from the plaintiff, and from the said registrar at Newcastle-upon-Tyne, and from other the collector and officers of customs at divers British ports, and from the officials of the Board of Trade defined by the said act, or from one or from some of such persons, all such persons being entitled by British law to inquire into the character of the said bark, or with the intent to assume a foreign character, or with intent to deceive such persons as aforesaid, or some or one of them, and whereby the said bark became and is forfeited to Her Majesty.

13. The plaintiff, as a British officer of customs, has seized and detained the said bark as having become subject to forfeiture to Her Majesty, and has brought her for adjudication before this court, pursuant to the said section.

The statement of claim claimed a declaration and judgment that the Annandale had become and was forfeited to Her Majesty; a sale of the vessel by the marshal of the court; and an award to the plaintiff out of the proceeds of the sale, or such portion thereof as the court might think right.

On behalf of the defendant Hans Lows, a statement of defence and counter claim (afterwards amended) was delivered on the 4th of November last, the 7th paragraph of such amended statement of defence was substantially in terms as follows:—

7. As to the said several matters in the statement of claim alleged to have been done by the persons and in the ways and with the intents respectively alleged in the statement of claim, the defendant says that on the 6th of July, 1876, he became *bona fide* purchaser of the bark Annandale for valuable consideration, and that at the time he became such *bona fide* purchaser he had no notice or knowledge whatsoever of the said matters in the statement of [182 claim contained, or any of them, or of the said matters having been done by the said persons in the ways and with the intents in the said statement of claim mentioned, or any of them, or of the said matters having been done at all.

The plaintiff demurred to the 7th paragraph.

March 20, 21. *Sir John Holker*, A.G. (*E. C. Clarkson*, with him), for the Crown, in support of the demurrer: The 103d section of the Merchant Shipping Act, 1854, provides that if any of the acts there enumerated are done by the owner or master of a British ship "such ship shall be forfeited to Her Majesty." The case of *Wilkins v. Despard* (¹),

(¹) 5 T. R., 112.

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decided by the Court of Queen's Bench in accordance with the earlier cases of *Robert v. Witherhead* (*) and *Hennell v. Perry* (*), is a clear authority that the effect of a statutory provision such as this, is that on the commission of any of the offences in respect of which the penalty of forfeiture is imposed, the property in the vessel forfeited under the section is at once divested out of its former owners, so that no subsequent dealings with such vessel can be of any avail against the title acquired by the Crown; in fact, the taint of illegality attaches when any wrongful act against the provisions of the section has been committed, and travels with the property into whosoever hands it may subsequently come. This principle of law, as settled in this country by *Wilkins v. Despard* (*), has, moreover, been approved and followed by the Supreme Court in the United States of America in the cases of *The United States v. Bags of Coffee* (*); *Gellstein v. Hoyt* (*). [He was here stopped by the court.]

Murphy, Q.C., and Milvain, for the defendant Hans Lows: It is clear, from the recent case of *The Telegrafo* (*), that a ship duly sold to a *bona fide* purchaser before any proceedings have been taken on the part of the Crown against her, cannot afterwards be arrested and condemned on account of offences the subject of forfeiture at common law. This, then, being the state of the law as it existed before the Merchant Shipping Act, 1854, was passed, has the Legislature, in the 103d section of that act, used language [83] *unambiguous enough to make such an alteration in the law as is contended for by the plaintiff? It has not. The language of the section clearly points to seizure, if not condemnation, taking place before the forfeiture can accrue. Thus the words "punishable" and "subject to forfeiture" would not have been used in the section if it had been intended that a forfeiture under its provisions should operate immediately on the commission of any of the acts therein prohibited. All the American cases which have been cited in favor of the Crown were decided on the authority of the case of the *United States v. Bags of Coffee* (*), and that case ought to be considered in the courts of this country as supporting quite as much the argument on behalf of the defendant as that on behalf of the Crown, for the decision there come to was not an unanimous decision,

(*) 12 Mod., 92; Salk., 228.

(*) 5 T. R., 117.

(*) 5 T. R., 112.

(*) 8 Cranch, 398; 3 Curtis, 188.

(*) 3 Wheaton, 311.

(*) Law Rep., 3 P. C., 673.

but that learned judge, Justice Story, dissented from the majority of the court, and gave an elaborate opinion in favor of the defendant. Moreover in the statute of Congress under which a right of action was given in that case it was expressly declared that certain prohibited articles should be forfeited "whenever" they were imported.

The Court of Queen's Bench, in deciding the case of *Wilkins v. Despard* ('), merely followed *Robert v. Witherhead* ('), where the repealed statute of 12 Car. 2, c. 18, had to be construed; and not only are the words of the 103d section of the Merchant Shipping Act, 1854, very different from those of the 1st section of the 12 Car. 2, c. 18, but in the case of *Wilkins v. Despard* (') there had been a seizure of the vessel alleged to be forfeited before the alleged transfer, but no sentence of condemnation. It is not necessary to insist that a sentence of condemnation must be pronounced before the property can be divested, it is enough to contend that the statute requires that the property subject to forfeiture should be seized, and that the title of the Crown only relates back to the time of the seizure. If it had been the intention of the Legislature that a forfeiture under the section of the Merchant Shipping Act, 1854, should relate back to the moment when an act against the section was done, similar words would have been used to those to be found in the 10th section of the Bankruptcy *Act, 1869 (32 & 33 Vict. c. 71), where it is expressly [184 declared that the bankruptcy of a debtor shall be deemed to relate back to the commission of an act of bankruptcy. The court ought to hesitate before it puts a construction on the section such as would enable the Crown to proceed in respect of a forfeiture under the section to the great inconvenience of commerce, however many transfers for valuable consideration had taken place, and however long a time had elapsed, since the section had been infringed.

Sir John Holker, A.G., in reply, cited *Henderson v. Distilled Spirits, &c.* (') and *Attorney General v. Norstedt* (').

SIR ROBERT PHILLIMORE: This is a proceeding on behalf of the Crown against the owners of a bark called the *Annandale*, in order to obtain a decree of forfeiture, or a sentence of forfeiture, under the provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 103). The first subsection of the 103d section of that act enacts:—

If any person uses the British flag, and assumes the British national character on board any ship, owned in whole or in part by any persons not entitled by

(') 5 T. R., 112.

(') 12 Mod., 92; Salk., 223.

(') 14 Wallace, 44.

(') 3 Prince, 97.

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law to own British ships, for the purpose of making such ship appear to be a British ship, such ship shall be forfeited to Her Majesty,

And then other provisions follow in the first sub-section, which it is not necessary to mention. The second sub-section proceeds as follows :—

If the master or owner of any British ship does or permits to be done any matter or thing, or carries, or permits to be carried, any papers or documents, with intent to conceal the British character of such ship from any persons entitled by British law to inquire into the same, or to assume a foreign character, or with intent to deceive any such person lastly hereinbefore mentioned, such ship shall be forfeited to Her Majesty;

Now it must be taken to be admitted in this case that on the 18th of July, 1874, the bark Annandale was fraudulently represented by one of her owners at the custom house at Newcastle-on-Tyne to have been sold to foreigners, and therefore she falls under the edge of that provision of the Merchant Shipping Act, 1854, which I have just read. The defendant, Hans Lows, sets up, amid other grounds, the following in the 7th paragraph of the amended statement [185] of defence and counter claim. [His Lordship *here read the paragraph in question.] Then the amended statement of defence and counter claim goes on to state that the bark Annandale was seized by the plaintiff on the 9th of July, 1876, and from that date is still detained.

The demurrer is taken to the validity of the 7th paragraph of the amended statement of defence and counter claim. It is contended on behalf of the Crown, that the property in this case was divested at the time when the owners committed the fraudulent act to which I have adverted. On the other hand, it has been contended on behalf of the defendant, Hans Lows, that the property was not divested until the seizure. It is admitted, as I understood, that it is not necessary to have had a sentence of condemnation, but it is contended that seizure was necessary in order to divest the owners of the property. Now the court has been referred to various cases in the courts of this country and in the courts of the United States of America, and it is not, in my judgment, necessary to do more than state the substance of the decisions which have been come to in the courts of this country. The case principally and properly relied upon is the case of *Wilkins v. Despard* (1), which seems to have followed two former decisions referred to in it—*Robert v. Witherhead* (2) and *Hennell v. Perry* (3); and the principle laid down in those cases, and adopted in *Wilkins v. Despard* (1) is, that the forfeiture accrued before

(1) 5 T. R., 112.

(2) 12 Mod., 92; Salk., 228.

(3) 5 T. R., 117.

seizure, and before the institution of any suit, at the time when the illegal and fraudulent act was done, and that it divested out of the owners the property which before they had in the ship, and that the seizure related back to the act which was the cause of the forfeiture.

I am of opinion that this position is a sound one in law, looking to the cases to which I have adverted, and that the demurrer must be sustained on the ground that the forfeiture accrued at the time when the illegal act was done, and that the seizure of the Annandale related back to the time of the wrongful act committed by the then owners. It will be therefore for the defendant to consider whether he will amend his plea.

Solicitor for plaintiff: *Toller*.

Solicitors for defendant: *Oliver & Botterell*.

[2 Probate Division, 189.]

April 17, 1877.

*THE ANEROID. (J. 434.)

[189]

Necessaries—*The Admiralty Court Act, 1861 (24 Vict. c. 10), s. 4*—*Sale of Vessel to Purchaser with notice of claim for Necessaries previously supplied.*

The statement of claim in an action of necessities *in rem* alleged that in November, 1874, the plaintiff had supplied to the owners of the vessel proceeded against certain stores necessary for her equipment; that in September, 1876, whilst the amount due in respect of the said stores was still unpaid, forty-three sixty-fourth shares in the vessel had been transferred to the defendant in the action with knowledge and notice of the plaintiff's claim; that the plaintiff became owner of the shares subject to such claim; and that the value of the shares was increased by reason of the said equipment, and the owners of the vessel had derived benefit therefrom:

Held, on demurrer, that the statement of claim showed no right of action in respect of the vessel as against the defendant.

THIS was an action of necessities, instituted on behalf of Daniel Jones against the brigantine Aneroid, belonging to the port of Swansea.

The statement of claim in the first three paragraphs alleged that the writ in the action was issued whilst the Aneroid was under the arrest of the court; that the plaintiff was employed in October, November and December, 1874, by T. P. Richards and S. B. Power, or one of them, the then owners or owner of the Aneroid, to supply certain stores and materials necessary for the equipment of the Aneroid; and that the plaintiff in respect of such stores and materials became entitled to be paid £221 16s. 2d.

The fourth and sixth paragraphs of the statement of claim contained substantially the following allegations:—

4. On the 21st of September, 1876, the said T. P. Richards and S. B. Power transferred forty-three of sixty-four sixty-fourth shares in the said brigantine to Abraham Hopkins who has appeared as a defendant in this action. The said Abraham Hopkins on the same day mortgaged the said forty-three sixty-fourth shares to the said T. P. Richards and S. B. Power. At the time of the last mentioned transfer, and at the time of the mortgage, the said sum of £221 16s. 2d. was still due and unpaid to the plaintiff, and A. Hopkins had thereby knowledge and notice of the same, and that the plaintiff claimed to be paid the same, and A. Hopkins became owner of the forty-three sixty-fourth shares, subject to the claim of the plaintiff.

6. The said sum of £221 16s. 2d. is still due to the plaintiff, and the plaintiff cannot obtain payment thereof without the assistance of this court. The value [190] *of the brigantine was increased by reason of the said equipment, and the persons who now are the owners of the brigantine have derived benefit and advantage therefrom.

The defendant demurred to the fourth and sixth paragraphs of the statement of claim, on the ground that it showed no right of action against the Aneroid in the hands of her present owners.

April 10. *J. P. Aspinall*, for the defendant in support of the demurrer, cited and relied upon *The Two Ellens* (¹), and *The Pieve Superiore* (²), as showing conclusively that the plaintiff had acquired neither a maritime nor an equitable lien. [He also referred to 24 Vict. c. 10, s. 4.]

G. Bruce, for the plaintiff: The defendant became interested in the Aneroid with notice that the plaintiff had supplied necessities for her equipment, and that the necessities had not been paid for. The value of the vessel was increased by reason of the necessities supplied to her, and the defendant acquired a benefit, with notice that a burthen was attached to the benefit. *Qui sentit commodum, sentire debet et onus*. *Hooper v. Gumm* (³); *Bristow v. Whitmore* (⁴); *Le Neve v. Le Neve* (⁵). This being so the plaintiff has a perfectly good cause of action, notwithstanding the 4th section of the Admiralty Court Act, 1861, does not confer a maritime lien. Not only did no question of notice arise in the case of *The Two Ellens* (¹), and the subsequent case of *The Pieve Superiore* (²), but the Judicial Committee of the Privy Council in the latter case, and Dr. Lushington in *The Alexander Larsen* (⁶), seem expressly to have refused to decide what the position of the material man would be where a shipowner had purchased a

(¹) Law Rep., 4 P. C., 161.

(²) Law Rep., 5 P. C., 482.

(³) Law Rep., 2 Ch., 282.

(⁴) 31 L. J. (Ch.), 467.

(⁵) 2 White & Tudor, Leading Cases in Equity, p. 28, ed. 1866.

(⁶) 1 Wm. Rob., 288.

ship with notice of a claim for necessaries supplied for her use.

Aspinall, in reply.

Cur. adv. vult.

SIR ROBERT PHILLIMORE: This is a demurrer to the statement of claim. The statement of claim alleges that the plaintiff *supplied certain stores and materials to the [191 brigantine *Aneroid* as part of her equipment. That *Richards and Power* were then the owners, but that they transferred forty-three sixty-fourth shares to *Abraham Hopkins* the defendant; the other shares being otherwise disposed of, and that at the time of the transfer the vendee had notice that the plaintiff's account was still unpaid.

The statement of claim also alleges that the vessel was under arrest in some other action when this action was brought.

The writ is *in rem* indorsed for £221 16s. 2d., and the claim is for the condemnation of the defendant and his bail in such amount as the court may direct, with costs. The question is whether a person supplying materials for the equipment of a ship is entitled to payment out of the *res*, when that *res* has been sold to a purchaser who has knowledge that the tradesman's claim is unpaid, but who purchases before any arrest of the ship?

If the question be answered in the affirmative it must be upon the ground that a tradesman has a lien which travels with the *res* after it has become the property of other owners.

Now it was admitted that the case of *The Two Ellens* (1) was a decisive authority as to there being no maritime lien. There is no question of an ordinary possessory lien. It has, however, been contended that there is in cases like the present an equitable lien, and certain cases were cited in support of this position. In my judgment this position cannot be supported.

It would be difficult to see what principle of equity could render the purchaser, who it must be presumed had paid the full value of the repaired ship, liable for the debt of the vendee to the repairing tradesman, with whom the vendee had no contract at all. I do not think that the fact of notice being given can create a lien which is neither a maritime lien nor a possessory lien; I must therefore pronounce for the demurrer with costs.

Solicitors for plaintiff: *Nelson, Son & Hastings*.

Solicitor for defendant: *Coote*.

(1) Law Rep., 4 P. C., 161.

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See *Desty's Shipping and Admiralty*, N.S., 1; *The Harriet Ann*, 6 Bissell, §§ 77, 87. 13; *The Artizan*, 8 Benedict, 338; *Griswold v. The Nevada*, 2 Sawyer, 144; *Brig Lady Hamilton*, Tucker's §§ 84-90; *The Europa*, 2 Moore, P. C., Select Cases, Newfoundland, 369.

[2 Probate Division, 218.]

July 17, 1877.

[IN THE COURT OF APPEAL.]

218]

*THE ANNANDALE.

Forfeiture—Intent to conceal British character of Ship—Sale to bona fide Purchaser for value after Offence committed, but, before seizure by the Crown—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) s. 103, subn. 2.

A cause of forfeiture, under the 103d section of the Merchant Shipping Act, 1854, was instituted on behalf of a British officer of customs against a vessel seized for an alleged infringement of the provisions of that section. The plaintiff in his statement of claim alleged that on the 18th of July, 1874, one of her owners being a British subject, had falsely represented, contrary to the fact, and with intent to conceal the British character of such ship, that she had been sold to foreigners. An appearance in the action having been entered on behalf of a foreigner as defendant, a statement of defence and counter claim was delivered on his behalf, which in the 7th paragraph thereof set up the defence that on the 6th of July, 1876, the defendant became *bona fide* purchaser of the vessel proceeded against, for valuable consideration, without knowledge of any of the matters alleged in the statement of claim. The plaintiff demurred to the 7th paragraph of the statement of defence:

Held, affirming the decision of the judge of the Court of Admiralty, that the demurrer must be allowed; for that the property in the vessel was divested out of its former owners, and vested in the Crown immediately on the commission of any of the offences in respect of which, under the provisions of the section, the penalty of forfeiture was imposed.

THIS was an appeal by the defendant Hans Lowe from a decision of Sir R. Phillimore allowing a demurrer to the statement of defence in an action of forfeiture under the 103d section of the Merchant Shipping Act, 1854, and holding that the ship Annandale, which was proceeded against in such action, was vested in the Crown at the time of the commission of the offences charged in the statement of claim (').

The pleadings and arguments are fully set forth in the previous report.

219] **Patchett*, Q.C., and *Milvain*, for the appellant.

The *Admiralty Advocate*, *Dr. Deane*, Q.C., and *E. C. Clarkson* (*Sir J. Holker*, A.G., with them), for the plaintiff. *Patchett*, Q.C., in reply.

In addition to the cases cited in the court below, the following authorities were referred to: Comyns' Digest, "For-

(¹) *Ante*, p. 595.

feiture;" *United States v. Brigantine Mars* ('); *Hubbard v. Johnstone* ('); *The Helena* (').

July 17. JAMES, L.J.: I think we must confirm the decision of the learned judge of the Court of Admiralty in this case. He proceeded upon the authority of two cases—two old English cases (')—which seem to have decided very much, indeed, almost the same point, that is to say, that where a forfeiture was imposed by a statute in similar terms to those made use of in the section before us, the property was divested by the offence committed, for that is the substance of those cases, and upon some cases decided after very great consideration by the Supreme Court of the United States of America ('), in conflict with the opinion of Mr. Justice Story, expressed in an elaborate disquisition (for that is certainly what it is) which we have heard to-day, and which he delivered, having dissented from the decision of the majority of the court in one of those cases. Those authorities seem to me to be very strong, and I agree with the language, if I may say so, of the Chief Justice of the Supreme Court of the United States, that the decision in those cases really turned upon the language of the statute. It seems to me that the language of the statute in this case is substantially the same as the language of the statute in *Wilkins v. Despard* ('), and it is that if a certain offence is committed the ship shall be forfeited. The 103d section of 17 & 18 Vict. c. 104, does not say that the ship shall be liable on conviction of the offence to be forfeited, but that the ship itself shall by reason of the offence be forfeited; and it goes on to say that the officer of the customs *shall seize the ship and shall bring her into court [220 for adjudication. Therefore it is impossible to deny that by the offence the ship has made herself liable to forfeiture, and has been seized under that liability, and I cannot see how that liability is got over by any dealing with the person who is the owner, and who has committed the offence for which liability attaches. It may be said it is a hard case, and those hardships are dwelt upon at great length by Mr. Justice Story, but those hardships are reduced in a great number of cases, and practically we do not find that any injustice will really arise. Purchasers do not often fall into difficulties which must exist in a case of this kind, or even in that which is more common, the case of purchasing

(1) 8 Cranch, 417.

(2) 8 Taunt., 177.

(3) 4 C. Rob., 3.

(4) *Robert v. Wetherhead*, 12 Mod., 92;
Wilkins v. Despard, 5 T. R., 112.

(5) *United States v. Bags of Coffee*, 8
Cranch, 398; *Gelston v. Hoyt*, 8 Wheat,
311.

(6) 5 T. R., 112.

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property which has been stolen. However, that is an inconvenience men must suffer if they buy property which happens to be in the possession of a person who is not the rightful owner. According to the view of the law which has been taken upon the cases I have referred to, the property of the rightful owner may be divested the moment a person has committed the offence for which it is to be forfeited, and being divested he cannot vest it in anybody unless there be a statutory provision to that effect, a provision like our law with regard to the sale of stolen goods in market overt, where a person who has no title does give a title to a purchaser. Without such a provision the person whose title is divested cannot give a title to any other person, however innocent that person may be. However, if there is any case of hardship, no doubt the Crown will always take that into its merciful consideration. I am of opinion, therefore, that the decision in the court below should be affirmed.

BAGGALLAY, L.J.: I am of the same opinion. It appears to me that the opposite construction of the 2d sub-section of the 103d section of the act would substantially render that section a dead letter; for the claim for protection is based upon this, that there is no actual forfeiture until adjudication, or at any rate until seizure; and if that were the true construction of the act no distinction could be drawn in the case of a purchaser for value with or without notice. If that be the case, as in almost every instance [221] where any act is done, which is made punishable *under the 2d sub-section, it is done in secret, it would not be impossible to make a sale of the ship before the time when any seizure could be made, or before the time when an adjudication could be brought about.

Reliance has been placed on the provision in the latter part of the section in which directions are given as to the process by which the ship is seized, and by which adjudication is obtained, but it appears to me those provisions are for the benefit of the shipowner, in order to afford him the opportunity to show that the seizure was improper. If he can show that the vessel was not liable to forfeiture at the time, then it could not be treated as a forfeiture, and in that case if the officer of the customs had not good ground for making the seizure, the officer is to be subjected to make amends as the court may think fit to direct.

COTTON, L.J.: I am of the same opinion. The section which applies to this case is the 2d sub-section of the 103d section of the act, aided by the proviso at the end of it. That second sub-section is to the effect that if a master shall

so offend the ship shall be forfeited, and not as has been contended, that it shall on adjudication be forfeited. The forfeiture results immediately on the offence being committed, and if there is any argument raised as to the construction of the words, "the ship which has become subject to forfeiture," then I say those words are not sufficient to alter what in my opinion is the true construction of the 2d sub-section of the 103d clause, which is that the forfeiture takes place when the act is committed. There is nothing, therefore, to show that the decision that the person conveying to the appellant had no title is wrong, and in my opinion the judgment of the court below is right.

I should mention that in the case of *Wilkins v. Despard* (1) there were similar provisions with regard to proceedings taken before the Admiralty Court, and in respect of any ships seized under that act; all admirals were required to bring in as a prize all such ships as should offend, and they were to be delivered over to the Court of Admiralty, and they were to be proceeded against. I should say that is even stronger than the words of the present *section, [222 and I should be unwilling, even if my opinion were contrary to what it is, to decide contrary to the decision in the appeal after the words contained in *Wilkins v. Despard* (1), but I am of opinion that on the commission of the offence the ship was forfeited, and that the forfeiture was not a subsequent thing.

JAMES, L.J.: The appeal will be dismissed with costs (*).

Solicitors for appellants: *Oliver & Botterell*.

Solicitor for respondent: *Toller*.

(1) 5 T. R., 112.

(*) Nov. 6. The action came on this day for hearing before the judge of the Admiralty Court. No person having appeared for the defendants,

The *Admiralty Advocate*, Dr. Deane,

Q.C. (*E. C. Clarkson* with him), moved the court to decree the *Annandale* to be forfeited to Her Majesty, and to condemn the defendants in the costs.

SIR R. PHILLIMORE made the decree asked for.

[2 Probate Division, 222.]

July 31, 1877.

THE PECKFORTON CASTLE. (O. 225.)

Regulations for preventing Collisions at Sea—Articles 12 and 17.

A ship and a bark were both on the port tack. The bark was the leading vessel, and had the wind three points free; the ship was close hauled and was overtaking the bark:

Held, that it was the duty of the vessel with wind free to keep out of the way of the other.

THIS was an action of collision instituted on behalf of the owners of the bark August against the owners of the Peckforton Castle, and was heard before Sir Robert Phillimore assisted by two of the Elder Brethren of the Trinity Corporation.

Clarkson and Hall for the plaintiffs.

Butt, Q.C., and Myburgh, for the defendants.

The facts sufficiently appear from the judgment.

SIR R. PHILLIMORE: It has been very properly admitted by the counsel on both sides that the real question at issue is whether the 12th or the 17th article of the regulations for preventing collisions at sea applies to the facts and circumstances of this case.

223] *The 12th article provides that, "when two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side;" (that is not the present case), "except in the case in which the ship with the wind on the port side is close hauled and the other ship free, in which case the latter ship shall keep out of the way. . . ." Now, the wind, according to the Peckforton Castle, in this case the defendant and a counter claimant, was N.W. by N., and according to the statement of the August was N. The Peckforton Castle, according to her own statement, was heading N.E. and by N. a little before the collision, and N.E. at the time of the collision—the August was heading about E. It appears that there was a difference of four points in the direction of their heads, and both had the wind on the port side.

The collision was caused by a sliding blow; the Peckforton Castle from leeward striking the starboard beam of the other vessel, the August, about her main rigging. Now the August admits in this case that she had the wind three points free. She says she saw the ship three points abaft her on her lee beam, and the question therefore comes to this, which of these two rules is to be preferred as governing this case? Does the rule which says, "the ship with the wind free shall get out of the way of the other" override, or is it consistent with the rule that "every vessel overtaking any other vessel shall keep out of the way of the said last mentioned vessel."

That is a question of course on which one pronounces with a certain amount of diffidence in spite of the assistance which I have had from the Elder Brethren of the Trinity House. But I am of opinion that the vessel which had the

wind free was being overtaken by the faster ship, and although the faster ship was close hauled, yet as both had the wind on the same side I am of opinion that the rule which governs this case is the rule which is contained in the latter part of the 12th article. I think the vessel which had the wind admittedly free ought to have ported in time to avoid a collision—at all events she ought to have taken any steps which were necessary to avoid the collision. I say again, I pronounce my opinion with great diffidence, but my *opinion on the best judgment I can form in this [224 matter is that the rule that applies in this case is that the vessel which has the wind free shall keep out of the way of the other. I must, therefore, pronounce the August alone to blame.

Solicitor for plaintiff: *Thomas Cooper.*

Solicitors for defendant: *Gregory, Rowcliffe & Co.*

[2 Probate Division, 224.]

June 22, 1877.

THE CYBELE. (O. 519.)

Salvage—Board of Trade—Steam-tug and Life-boat belonging to Ramsgate Harbor—The Harbors and Passing Tolls Act, 1861 (24 & 25 Vict. c. 47), pt. vii—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 484, 485.

Under the Harbors and Passing Tolls, &c., Act, 1861, part vii, the harbor of Ramsgate and the property and powers of its trustees are transferred to the Board of Trade. In a suit for salvage remuneration for services rendered by a vessel belonging to the harbor, and vested in the board, under the provisions of the act:

Held, that the vessel was not "one of Her Majesty's ships" within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, ss. 484, 485), and that the claims must be adjudicated upon without the consent of the admiralty in the section last mentioned.

THIS was a cause of salvage instituted on behalf of the owners, master, and crew of the Ben Achie, against the steamship Cybele.

On the 20th of February last the owners of the Cybele having appeared, the judge gave leave to them to serve a notice on the Board of Trade, the owners of the steam-tug Vulcan, and the master and crew of the Vulcan, and the crew of the Bradford, a life-boat at Ramsgate, calling upon them to enter an appearance in the action in order that their claims, if any, for salvage services rendered to the Cybele might be adjudicated upon. Notices having been served in pursuance of the leave so given, the solicitors for the Board of Trade entered an appearance on behalf of the Board of Trade, and the master and crew of the Vulcan,

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and the crew of the Bradford. On the 13th of March, the judge directed that the solicitor for the Board of Trade should have the conduct of the action, but afterwards on 225] the 13th of April an order was made by *consent that the solicitors for the owners, master, and crew of the Ben Achie should have the conduct of the action.

On the 26th of April the statement of claim was delivered in the action. It alleged, *inter alia*, that on the 24th of December, 1876, whilst the Ben Achie was lying at anchor off Deal Pier awaiting orders from her managing owner, in reply to her master's telegram to such owner, the attention of those on board was, at about 10.30 p.m., attracted by signals from the Gull light vessel; that the Ben Achie then went in search of the vessel supposed to be in distress, and after some time found the Cybele ashore between the East Goodwins and the North Sand Head, with the Vulcan and the Bradford in attendance; that the Vulcan and the Ben Achie having made fast to the Cybele ultimately succeeded in towing her off the ground, and bringing her up in safety in the Downs off Deal, where the three vessels arrived at about 10 a.m., on the 25th of December. The statement of claim then proceeded in the 31st, 33d, and 36th paragraphs, *inter alia*, substantially as follows:—

31. Upon arrival off Deal the master of the Ben Achie received the expected telegram from his managing owner, directing him to proceed to Weymouth to fulfil an engagement from which the sum of £165 would have been realized. This telegram would have been received on the previous evening had the Ben Achie remained at her anchorage. The Cybele being deprived of her steam power and having only one anchor, the master of the Ben Achie determined to remain by the Cybele, and did not attempt to fulfil the said Weymouth engagement, it being then too late for him to do so.

33. By rendering her said services the Ben Achie's hawser was damaged to the extent of £50, and she lost the benefit of the said Weymouth engagement, and the Vulcan lost a hawser worth £25.

36. The owners, master and crew of the Vulcan and Bradford have appeared in this action, pursuant to notice served on them by the defendants, and claim salvage for their services.

On the 8th of May, counsel, on behalf of the defendants, moved the judge in court to order the 31st article of the statement of claim and the words "and she lost the benefit of the said Weymouth engagement" in the 33d article of the same to be struck out. The motion was opposed by counsel on behalf of the plaintiffs, but was granted by the court, on the ground that the said 31st paragraph alleged matters which the court could not take into consideration in awarding salvage remuneration in the action.

226] *On the 14th of May the solicitors for the defendants

delivered their statement of defence. The 10th paragraph thereof was substantially as follows:—

The Board of Trade are the owners of the *Vulcan* and the National Life-boat Institution are the owners of the *Bradford*. Neither the Board of Trade nor the National Life-boat Institution have made or could make any claim in this action in respect of their ownership of their respective vessels and the tackle belonging to them.

The plaintiffs, in the 2d paragraph of their amended reply, alleged that the Board of Trade owned the *Vulcan*, and further alleged that the Board of Trade, and not the National Life-boat Institution, were the owners of the *Bradford*, and that the Board of Trade could and did make a claim in the action in respect of both vessels and the tackle belonging to them respectively.

The following rejoinder was delivered:—

1. The defendants join issue upon so much of the 2d paragraph of the reply as relates to the National Life-boat Institution.

2. The defendants demur to so much of the 2d paragraph of the reply as relates to the Board of Trade, and say that the same is bad in law, on the ground that it is contrary to the provisions of the Merchant Shipping Act, 1854, and on other grounds, &c.

June 22. *Myburgh*, and *W. G. F. Phillimore*, for the defendants, in support of the demurrer: The defendants are entitled to succeed on the demurrer, inasmuch as the *Vulcan* and the *Bradford* being vessels employed in the public service of the Crown are clearly within the provisions of the 484th section of the Merchant Shipping Act, 1854. That section prohibits any salvage claim being made in respect of the use of "any ship belonging to Her Majesty," whilst the next succeeding section requires that the consent of the Admiralty be obtained before the "commander" or crew of any of Her Majesty's ships can claim salvage remuneration. It may be that vessels belonging to the Board of Trade are within both of these sections, but it is enough for the defendants to contend that the application of the first of the two sections is not merely restricted to ships under the control of the Admiralty, such as are, more properly speaking, Her Majesty's ships, and are known in this court as Queen's ships, but was intended by the Legislature to extend to all vessels, the loss of which, as would be the case here (24 & 25 Vict. c. 47, s. 36), would be supplied out of *the [227 public funds: *The Cargo ex Woosung* (*), *The Earl Dufferin* (*), *The Thetis* (*). Under the 7th part of the Harbors and Passing Tolls Act, 1861, the harbor of Ramsgate is vested in the Board of Trade, together with all property

(*) 1 P. D., 260.

(*) 7 N. of Cas., Sup. p. xxxiii.

(*) 3 Hagg. Adm., 14, at p. 61.

belonging to it, and has thereby become a public harbor; and by the 28th section of the same act the Board of Trade are to receive a percentage on all salvage in respect of ships or property brought into the harbor. The Legislature could not have meant that the owners of salvaged vessels should in addition to paying this percentage have to satisfy the claims of the Board of Trade, as if the vessels belonging to the harbor belonged to private owners.

E. C. Clarkson and Wood Hill (Cohen, Q.C., with them), for the plaintiffs: Neither the 484th, nor the 485th section of the Merchant Shipping Act, 1854, can have any application to vessels owned, as the Vulcan and the Bradford are by the Board of Trade, not as a public department under the Crown, but as the existing trustees of the harbor of Ramsgate. Up to the time of the passing of the Harbor and Passing Tolls Act, 1861, the then trustees of the harbor were entitled to claim salvage in respect of the use of the vessels belonging to the harbor, and the 23d section of the same act secures to the Board of Trade all the rights possessed by the trustees before the transfer. The Legislature could never have intended that the operation of this clause should be restricted by the provisions of the 484th and 485th sections of the Merchant Shipping Act, 1854, which were passed whilst the harbor was vested in the former trustees. Moreover, the provisions of the 28th section of the Harbors and Passing Tolls Act, 1861, instead of supporting the defendant's contention are really in favor of the plaintiffs, as that section, far from taking away the capacity of the Board of Trade to earn salvage remuneration in respect of vessels belonging to the harbor, confers the additional right of claiming a percentage on all salvage remuneration which may be paid, or become payable in respect of salvage services rendered to all vessels brought into the harbor, whether such vessels belong to the harbor or not. Moreover the Court of Admiralty has before now awarded salvage remuneration to the Board of Trade and the master and crew of the Vulcan in respect of the services of that vessel: *The Lord Straithnairn* ⁽¹⁾.

Myburgh, in reply: The language of that part of the Harbors and Passing Tolls Act, 1861, which relates to Ramsgate Harbor, is very different from that employed in the same act with respect to the harbors of Dover and Whitby, which are not vested in the Board of Trade, but in commissioners.

(1) Adm. Court, May 14, 1875.

SIR ROBERT PHILLIMORE: In this case a question of some curiosity and nicety is raised for the first time in this court, as to the construction of certain sections of the Merchant Shipping Act, 1854, in comparison with the provisions of 24 & 25 Vict. c. 47, the act which is called "The Harbors and Passing Tolls Act, &c., 1861."

Now it must be taken as admitted, for the purpose of the present discussion, that the steam-tug Vulcan, and the life-boat Bradford, both belong to Ramsgate Harbor, and came out of Ramsgate Harbor to render the salvage services in this case. These facts being admitted, the question to be decided on the demurrer is, whether the Vulcan and the Bradford are Her Majesty's ships, in the sense in which that phrase is used in the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104. If they are such ships in the sense there used no remuneration at all can be claimed on behalf of the vessels themselves; and their crews, and the master of the Vulcan can only claim remuneration for salvage services after obtaining the permission of the Lords of the Admiralty to make such a claim. The sections in the Merchant Shipping Act, 1854, to which I have referred, are headed "Salvage by Her Majesty's ships," and the first section of the two—section 484—is as follows:—

"In cases where salvage services are rendered by any ship belonging to Her Majesty, or by the commander or crew thereof, no claim shall be made or allowed for any loss, damage, or risk thereby caused to such ship, or to the stores, tackle, or furniture thereof, or for the use of any stores, or any other articles belonging to Her Majesty supplied in order to effect such services, or for any other expense or loss sustained by Her Majesty by reason of such services."

*The next section is:—

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"No claim whatever on account of any salvage services rendered to any ship or cargo, or to any appurtenances of any ship by the commander or crew, or part of the crew of any of Her Majesty's ships, shall be finally adjudicated upon, unless the consent of the admiralty has first been obtained, such consent to be signified by writing under the hand of the secretary to the admiralty. . . ."

The rest of the section, it is not necessary to read. The first contention has been that there is a distinction between "any ship belonging to Her Majesty," in sect. 484, and "any of Her Majesty's ships," in sect. 485. I am unable to follow the subtlety of that distinction. I think that the two sections are in *eadem materiâ* and both relate to those of Her Majesty's ships, with regard to which it is declared by the 485th section of the Merchant Shipping Act, 1854, that no salvage reward on account of any services rendered by their commanders or crews shall be made without the consent of the admiralty. The contention of the defendants in support of the demurrer is now brought forward for the

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first time, but that circumstance does not dispose of any difficulty that may arise on the construction of the above sections. At the same time if such a construction as the defendants contend for is the right one, it is remarkable that, inasmuch as the *Vulcan* was not what Lord Stowell would call a *novus hospes* in the Court of Admiralty, the question now raised should not have been brought forward before. Then how does 24 & 25 Vict. c. 47, affect the question? It is said that the purport of that portion of 24 & 25 Vict. c. 47, which relates to the present question, is that the harbor of Ramsgate, then vested in the trustees of the harbor, shall be transferred with all its incidents to the Board of Trade, who are, it is contended, consequently the trustees of Ramsgate Harbor. Then there follows a provision cited for a different purpose, but which really on examination appears to me to be very adverse to those who are contending for the validity of this demurrer; the 28th section of the same act providing that the Board of Trade shall receive a percentage on any salvage earned by all vessels using the harbor—not by vessels belonging to Ramsgate Harbor, but by any vessels brought into the harbor. I, myself, cannot come to any conclusion otherwise than in favor of the plaintiffs, though I admit the case may be plausibly stated the 230] other way. I cannot *think, on examination of the sections of 24 & 25 Vict. c. 47, which relate to Ramsgate Harbor, that it was the intention of the Legislature to place a tug and a life-boat, belonging to Ramsgate Harbor, which, before that act passed, were owned by the trustees of the harbor, in the category of Her Majesty's ships. It is true that in one sense the *Vulcan* and the *Bradford* are to be considered as belonging to the Crown, because they are owned by the Board of Trade, and the Board of Trade is a department under the Crown. But, still, acts of Parliament must be read in the light of common sense, and, looking to the wording of the sections I have referred to, I am of opinion that this attempt to place this tug and this life-boat, belonging to Ramsgate Harbor, in the category of Her Majesty's ships, and, in consequence, to require the court to hold that the Board of Trade are not entitled to salvage remuneration so far as the services of the vessels themselves are concerned, and that before any salvage suit can be brought to recover in respect of the services of their commanders and crews the consent of the admiralty is required, cannot be really maintained. I must, therefore, pronounce against the demurrer.

The case was then heard upon the merits before the judge,

assisted by two of the Elder Brethren of the Trinity Corporation. Witnesses on behalf of the plaintiffs were examined orally in court. On behalf of the plaintiffs, it was proved, *inter alia*, that the Bradford was owned by the Board of Trade, and not by the National Life-boat Institution. No evidence was given as to the consent of the Admiralty having been obtained to the prosecution of the salvage claims made by the master and crew of the Vulcan and the coxswain and crew of the Bradford.

THE COURT, after hearing arguments on behalf of the plaintiffs and the defendants, awarded £500 to the owners, master, and crew of the Ben Achie, and £1,200 to the owners, master, and crew of the Vulcan, and the owners, coxswain, and crew of the Bradford.

Solicitors for owners, master, and crew of the Ben Achie : *Clarkson, Son & Greenwell.*

For owners, master, and crew of the Vulcan and the Bradford : *Solicitor for the Board of Trade.*

Solicitors for defendants : *Pritchard & Sons.*

[2 Probate Division, 231.]

Aug. 7, 1877.

*THE ANDALUSIAN. . (A. 342.)

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Collision—Precautions to be taken by those in charge of Vessel about to be launched on the River Mersey—Burden of Proof.

When a vessel is launched in a river, the law casts upon the persons in charge of the launch the obligation of conducting the launching operations with the utmost precautions, and of giving such notice as is reasonable and sufficient to prevent any injury to passing vessels.

Circumstances in which it was held that proper precautions had not been taken.

THIS was an action of damage instituted on behalf of the owners of the ship Angerona, her master and crew and the owners of her cargo against the ship Andalusian, and against F. Leyland & Co., shipbuilders, her owners intervening as defendants. The action was brought to recover damages sustained by the Angerona in a collision which occurred on the river Mersey on the afternoon of the 14th of July last, when the Angerona, in tow of a tug, was run into by the Andalusian on the occasion of the latter vessel being launched from the defendants' shipbuilding yard on the Cheshire side of the river.

The 7th, 8th, 9th, and 12th paragraphs of the statement of claim were substantially in terms as follows :—

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7. The said collision was caused solely by the neglect or default of those having charge of the Andalusian, and of the operations for launching her, and was not caused by any default or neglect on the part of the Angerona or her tug.

8. The Andalusian was improperly launched at a time when the river opposite the said shipbuilding yard was not clear.

9. A proper, sufficient, and usual notice and warning of the said launch was not given prior to the said launch.

12. Those in charge of the Andalusian and the said launching operations improperly neglected to keep a good look-out.

The defendants in the 2d paragraph of the statement of defence alleged in substance as follows:—

2. Before the Andalusian was launched, and whilst she was being launched, she had flags flying on poles fitted where her masts were to be, and a flag at her bow and two flags at her stern; she had two steam-tugs which were decorated with flags in the river in attendance on her, and boats were also lying in the river in readiness to pick up the timber used in launching her, and proper warning and proper public notification had been given that she was about to be 232] *launched, and those on board any vessel in the neighborhood could and ought to have seen that she was about to be launched, and she was fitted with the usual and proper anchor and tackle.

The subsequent paragraphs of the statement of defence contained allegations to the effect that, just before the Andalusian began to move, the Angerona and her tug were seen by those who had charge of the launch about half a mile distant, and higher up the river than the Andalusian, and stationary, or nearly so, and not in the way of the Andalusian, and the river was clear for the Andalusian to be launched; that after the dogshores had been knocked away it was impossible to stop the Andalusian, and the Angerona and her tug were seen to be coming ahead at a considerable speed; that thereupon the tug of the Angerona, instead of keeping on ahead, improperly stopped her engines, and the Andalusian shortly afterwards with her rudder and stern-post came into collision with the portside of the Angerona, and that those on board the Angerona and her tug neglected to keep a good look-out, or to keep on the Liverpool side of the river as they ought to have done.

Aug. 4, 6, 7. The action was heard before the judge and two of the Elder Brethren of the Trinity Corporation.

Benjamin, Q.C., Myburgh, and W. G. F. Phillimore, appeared for the plaintiffs.

Butt, Q.C., and E. C. Clarkson, for the defendants.

The evidence so far as material to this report is stated in the judgment.

[The follow authorities were referred to: *The Vianna* (¹), and *The Glengarry* (¹).]

(¹) *Swa.*, 405.

(²) *Note, post*, p. 235.

Aug. 7. SIR ROBERT PHILLIMORE: This is a case of collision which took place in the river Mersey on the 14th of July in this year between one and two o'clock in the afternoon. It took place in this way—by a vessel called the Andalusian being launched stern foremost into the river and striking the portside of a vessel called the Angerona with her stern, the Angerona being at that time in tow of a tug and going down the river on her road to sea.

*The question which the court has had to consider, [233 with the assistance and advice of the Elder Brethren of the Trinity House, has been whether, looking at the law which I will presently state, the Angerona was to blame for this collision, and as there is a counter claim, whether the Andalusian was to blame.

Now with respect to what is the law when a vessel is launched in a river like the Mersey, the court was under the necessity on a former occasion of laying down fully the law on this point in the case of *The Glengarry* (¹). I may state briefly that I am of opinion that the law throws upon those who launch a vessel the obligation of doing so with the utmost precaution, and giving such a notice as is reasonable and sufficient to prevent any injury happening from the launch; and, moreover, that the burden of showing that every reasonable precaution has been taken, and every reasonable notice given, lies upon her and those managing the launch.

Now the case on the part of the Angerona is briefly this: She was coming out of the Canning Dock and going across the river in tow of a tug called the Gladiator—the facts which I am about to state are not controverted. On her way she passed some flats very close indeed, so close that, to avoid a smash and in order to pass with safety, she ported her helm for a vessel called the Andrew Lovatt, which was going to sea in charge of a tug, but at a much greater speed. I think that there is no doubt that it was proved that there was a proper look-out on board the Angerona, and that she was properly navigated. It is also a fact, and one of some importance in this case, and it is not denied that the Angerona left the Canning Dock at ten minutes past one o'clock, and that the collision took place at thirty-six minutes past one o'clock not far from Seacombe, so that there were twenty-six minutes to be accounted for. According to the evidence it appears to me and to the Elder Brethren of the Trinity House that the tug of the Angerona may have taken about ten minutes in easing her engines, in

(¹) See *post*, p. 619.

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order to facilitate the operation of discharging a party of riggers who were on board the Angerona. There would then remain fifteen minutes to be accounted for. It appears to us that this is not an unimportant fact. The plaintiffs 234] say that the Angerona in the *position she was and whilst moving slowly down the river was run into by the stern of the Andalusian, and received very serious damage.

Now the case on behalf of the Andalusian briefly stated is this, that she was to come off the ways on the 14th of July, and that it was well known, as no doubt the fact is, that she was to come off a little before two o'clock or thereabouts. First of all the defendants say we discharged the obligation the law cast upon us by giving a proper notice of the launch, and taking all due precautions we caused to be put up in the pilot house at Seacombe, the following notice: [His Lordship here read the notice (1), and after observing that the pilot of the Angerona stated that he had not seen it, and that there appeared to be no legislative obligation on him to have done so, proceeded:] I am clearly of opinion that the putting up of the notice was not a precaution that could avail in any degree as a substitute for other precautions which it was necessary for those in charge of the launch to take. Then the defendants say that the other precautions taken by them were these, that there were five flags upon the ship about to be launched, and there were two tugs, and those tugs had two boats; one of the tugs was stationed ahead of the launch, and it is stated that the tug so stationed was not decorated with flags in the usual way to give an indication that the launch was about to take place. It has also been proved by many respectable ship-owners who have given evidence in this case, that their usual habit is to employ one of the tugs in attendance on the launch, not only to see that the way is clear, but to give notice to any vessel that is passing that a launch is about to take place. It would seem, according to common sense, that to give notice of the launch to passing vessels must be the principal object for which tugs are employed. Now there is evidence in this case that those on board both the tug ahead of the launch, and the gig near her, were aware of the presence of the Angerona, but took it for granted that the master and crew of the Angerona, knew 235] that there was a launch, and therefore *gave no no-

(1) The notice was signed by the superintendent of pilotage, and contained a direction to the pilots that they should as far as possible comply with the request of Messrs. Leyland & Co., that

no vessel might be anchored in such a position as would interfere with the launching of a steamer from their building yard at Seacombe on Saturday next, July 14, 1877.

tice to her that it was about to take place. [His Lordship then passed to a consideration of the evidence as to the look-out kept on board the launch, and expressed an opinion that the pilot stationed on the look-out to inform those in charge of the launching operations when the vessel might be safely launched had neglected to make a proper report.]

Now, it appears to me if the law I have stated be correct, namely, that it is the duty of those in charge of the vessel about to be launched to apprise the navigation, and give every reasonable notice that a launch is about to take place, then it is apparent from the defendant's own evidence that the obligation cast on the plaintiffs by the law has not been discharged in this instance: that being so without going further into the case I have, with the approbation of the Elder Brethren of the Trinity House, come to the conclusion that the Andalusian is alone to blame for this collision, and I so pronounce.

Solicitors for plaintiffs: *Duncan, Hill & Dickinson.*

Solicitors for defendants: *Simpson & North.*

[IN THE COURT OF ADMIRALTY.]

[2 Probate Division, 285.]

Feb. 7, 1874.

THE GLENGARRY. (L. 127.)

THIS was a cause of damage instituted on behalf of the Bridgewater Navigation Co., as owners of the flats or barges, Industry and Atlas, their cargo and freight against the ship Glengarry, and against her owners, defendants intervening.

Feb. 7. The case was heard before the judge, assisted by two of the Elder Brethren of the Trinity Corporation.

Aspinall, Q.C., and *Gully*, appeared for the plaintiffs.

Butt, Q.C., and *Myburgh*, for the defendants.

The nature of the pleadings, the result of the evidence and the arguments of counsel, with the authorities referred to by them, can be sufficiently gathered from the judgment.

SIR ROBERT PHILLIMORE: On the 28d of October in last year, shortly before high tide, between noon and a quarter-past 12 or twenty minutes past 12, in the river Mersey, the Glengarry which was then launched from the Liverpool side of the river went stern foremost into the port bow of the Industry, which afterwards struck the portside of the Atlas, they being two out of a *num- [236 ber of vessels called flats which were on the port and starboard side of a tug called the Bridgewater, and the question for the court is who is to blame for this collision, whether the tug which had these two vessels in tow is to blame, or whether the Glengarry, the launch, is to blame having regard to all the circumstances of the case.

It may be almost unnecessary to make any observations on the general law relating to these cases of vessels launched, after the full discussion which they have undergone in the three cases to which reference has been made: the case

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of *The Blenheim*⁽¹⁾; the case of *The Vianna*⁽²⁾; and the more recent case before the Judicial Committee of the Privy Council, *The United States*⁽³⁾. There is no doubt whatever as to the law which has been laid down for a considerable period and always observed in this court, namely, that it is the duty of those who launch a vessel to do so with the utmost precaution, and to give such notice as is reasonable and sufficient to prevent injury happening from that event, and that the burden of proof lies on them. There is no doubt at all that those who defend the cause of the launch have the obligation cast upon them of showing that it took place in such circumstances as ought, with reasonable precautions on the other side, not to have brought her into collision. What is reasonable notice must of course depend very much on the facts of each case. It was very well said in the case of *The Blenheim*⁽¹⁾, that what is "reasonable notice" depends "upon local circumstances, as for instance, the breadth of the river, the number of vessels passing, and other circumstances of that kind." "It must not be a mere general notice that a launch is to take place on a particular day;" the notice must so specify the time of the launch that vessels navigating up and down the river may not be damaged or incur danger.

The first subject which the court must consider is whether according to the evidence in this case there was such reasonable notice as the law requires given by those who launched the Glengarry?

Now the Glengarry was a very large vessel, I think of 1,800 tons. She was launched from the slip of Mr. Royden on the Liverpool side of the Mersey, and it appears from a variety of evidence which it is not necessary to go into in detail, that it is customary in the river Mersey before a launch takes place that a certain number of flags should be put on poles which are placed where the masts are to be, if it is a bark or a ship three poles; a brig two poles; that there should be a certain number of flags put on poles in the vessel as indicating that the vessel is about to be launched.

It appears that it is customary to have two steam-tugs in attendance on the vessel, and for one of the steam-tugs to have flags of various kinds on it, and it appears also, that it is customary to have gigs pulling about, in order to pick up some of the timber, which would otherwise be lost when the operation of launching takes place. All these precautions were taken in this instance, and it is not denied, and could not be denied, that the proper and usual general notice was given that the launch was about to take place.

It is said that a more specified notice was required, and various suggestions were made as to what the specific notice should be, but no evidence was produced *before me at all that any such special notice is habitually given in cases of this description. One witness, indeed, did say that it was usual that a tug should be in mid-river just before the vessel is launched; but that witness stood almost alone in his opinion, and the pilot who was produced on behalf of the plaintiffs in the case, in enumerating what precautions were necessary to be taken in order that a launch should take place in safety, did not mention that it was a necessary circumstance that there should be a tug-boat in mid-river; but he did recapitulate all these precautions, which, as a matter of fact, were taken in this case.

The yard or slip from which this launch took place, is one in which it appears from the evidence a great number of vessels were built, and I think the evidence was that a considerable number were launched every year. I think Mr. Royden, who was examined, said twelve or thirteen. Therefore, putting all these circumstances together, I am of opinion that the principle of the law to which I have referred, justifies me in saying that there was, on the evidence, not only a general notice, but a sufficient notice according to the usage of the place that a launch was about to take place. At this time it was known perfectly well that the launch could only take place very near to the time of high water.

Now high water was about twenty-four minutes past 12 on this occasion. The

(1) 2 Wm. Rob., 421; 4 N. of C. 393. (2) Swa., 405. (3) 12 L. T. (N.S.), 83.

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collision took place, I think, about a quarter past 12, and the launch took place about six or seven minutes past 12, according to the best calculation one can arrive at. One is always liable to be a little erroneous when one comes to a minute fraction of time, but it appears, after the best consideration that I can supply, that that is as nearly as possible the correct period.

I must mention what has made a considerable impression on the mind of the court. It appears not only from the evidence produced on behalf of the plaintiffs, but also from that produced on behalf of the defendants, especially the evidence of the master of the tug Bridgewater, that the Glengarry stood very high on the ways, and that there was nothing to prevent the master of the Bridgewater seeing her from the Morpeth Dock, and that in fact, he did see her from there, and must have seen that she had her proper flags up. It becomes necessary to make some short statement with regard to the tug and the flats. The Bridgewater came out of Morpeth Dock with, I think, eight or nine flats in tow, so many on her port quarter and so many on her starboard quarter.

Now, according to the statement of the master of the tug, the Glengarry, with the flags indicating an approaching launch, was visible to him before he came out of the dock. He knew, for the reasons which I have already stated, that the launch would take place very nearly about high water, and I admit the proposition that was contended for by the counsel for the plaintiffs, in this case, that it is not competent to those who are about to launch a vessel to block up the navigation, not only for a day but for a considerable period of time. But in this case, the evidence satisfies the court, that the master of the tug must have been aware that the launch would take place within a very short time of high water, say twenty minutes or a quarter of an hour, and that being made plain to him when he was in the Morpeth Dock it was his duty, as it appears to the court, after consulting with the Elder Brethren of the Trinity House, who are entirely of the same opinion—it was the duty of the tug, when in Morpeth Dock, either to wait a quarter of an hour or twenty minutes, if she thought there was any danger to be incurred by the launch; or it was her duty *when she came out (she had full option to choose which course she [238 would take) to have ported her helm and to have kept up on the west shore, in which case the collision would not have happened.

According to the evidence, we believe she did not take this course, and, indeed it seems to be perfectly well proved in the case, that she came out into mid-channel. Now what precautions were taken besides those general precautions I have mentioned by those who were about to launch the Glengarry? Really it seems every caution that could be required was taken. The look-out so far from being as suggested, a bad look-out, appears to have been of a very good description; the pilot says he was aft on the ship; there were two tugs in attendance, plying about an hour before. Then he says, he looked to see if the river was clear, he saw three flats, and he waited till they got clear; he looked again to see if the way was clear, and then he gave the order to let go. Mr. Royden, who was on a stage under the bows, himself performed what I believe is the usual ceremony on such occasions, of cutting the ropes, and the vessel began to move. After the vessel had so begun to move, the pilot called out "hold on," or "stop the launch," and it has been contended that if he had discharged his duty properly he would have said that before the vessel began to move, and before the last rope had been cut. But the court is not of that opinion. It may very well be, as was very ingeniously suggested by Mr. Myburgh, that as this tug and the flats came out of Morpeth Dock, they came in a direct line and did not present themselves to the view of the pilot, until the vessel had parted. But be that as it may, there was no necessity for any collision in this case if the tug had taken the proper course of keeping along the west shore. We believe upon the evidence, that the tug when reported had arrived a quarter of a mile north-north-west of Mr. Royden's slip in mid-channel, and was not, as she represented herself to have been, off Tranmere Ferry. The Glengarry had to go 600 yards to the place of collision, and she was stopped in mid-river against

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the flat into which she ran. In fact, when the whole case comes to be examined, it resolves itself into this, that in our judgment the tug steamed right across the path of the Glengarry, and that she did nothing but go on full speed, and took no measures whatever to avoid the collision. Having arrived at this conclusion, it seems unnecessary, in my judgment, to go into the other parts of this case; and I have no hesitation in pronouncing under the advice I have received, that the plaintiffs in this case have failed to establish the averments in their petition, and that I must reject that petition.

Solicitors for plaintiffs: *Isham ; H. E. Gill.*

Solicitors for defendants: *Bateson & Co.*

[2 Probate Division, 239.]

April 17, 1877.

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*THE AGINCOURT. (C. 116.)

Jurisdiction—Foreign Vessel—Co-ownership.

An action of co-ownership was instituted on behalf of a foreigner against a foreign vessel. On the vessel being arrested an appearance under protest was entered for another foreigner, who applied that the action should be dismissed.

It appeared that the representative of the state to which the ship belonged declined to interfere, and the court dismissed the action with costs.

THIS was an action instituted on behalf of a Spanish resident at Liverpool, against the bark Agincourt and her freight. The writ in the action was indorsed as follows:—

The plaintiff's claim is for the purpose of enforcing his right as a part owner of the Agincourt, and to have an account of her earnings taken.

The vessel was arrested in the action, and on the 22d of March an appearance under protest was entered on behalf of the owner of the Agincourt, and notice was given on his behalf that the judge in court would be moved to order that the action be dismissed with damages and costs, on the ground that the court had no jurisdiction.

Affidavits on behalf of the defendant were filed in support of the motion. In such affidavits it was alleged in effect that the defendant, a Spanish subject, usually resident at Bayona, in Spain, had purchased the Agincourt, and had caused her to be repaired at a considerable cost; that in the month of March the Agincourt had been duly registered as an Argentine vessel, and a provisional register, available until her arrival at any Argentine port, and describing the defendant as her sole owner, obtained from the Argentine consul at Liverpool; that the plaintiff being desirous of having an interest in the vessel, it was agreed that he should have a quarter of a share of the vessel on his paying there-

for one-fourth of the purchase-money paid by the defendant, and also one-fourth of the outlay for the repairs, outgoings, and disbursements for the next voyage; that the plaintiff had not fulfilled the agreement; and that the vessel was under charter, and the defendant was liable in damages in consequence of the arrest and detention of the vessel. It was further alleged that no notice of *the institu- [240
tion of the suit or of the arrest of the vessel had been given to the Argentine consul by the plaintiff.

On behalf of the plaintiff an affidavit was filed, which stated that the English register of the Agincourt had been closed, and that she had been registered as an Argentine vessel on the 1st of March last, but that the closing of her English register and her registration as an Argentine vessel had been without the plaintiff's consent.

March 28. *G. Bruce*, on behalf of the defendant, moved in accordance with the notice of motion: It is very doubtful whether under any circumstances the court would have jurisdiction to entertain a suit like the present where not only the ship proceeded against is a foreign vessel, but all parties to the action are foreigners, *The Johan and Siegmund* (*); 36 & 37 Vict. c. 66, s. 34; but however this may be, it is clear that the court in cases of possession where foreigners alone are concerned, will decline to exercise jurisdiction unless the accredited agent of the foreign state to which the ship belongs has given his consent: *The See Reuter* (*); *The Evangelistria* (*).

R. A. Pritchard, for the plaintiff, contra: The court will not decline to exercise jurisdiction where, as here, it can do complete justice between the parties. [He referred to *The Evangelistria* (*).]

SIR ROBERT PHILLIMORE: The motion must stand over in order that a communication may be made to the consul of the foreign state to which the ship belongs. I think that application ought to have been made to the Argentine consul earlier in the suit, and that the plaintiff is entitled to the costs of the application to-day.

April 17. *G. Bruce* renewed his motion.

Pritchard, for the plaintiff, stated that application had been made to the Argentine consul, but that he had declined to intervene.

SIR ROBERT PHILLIMORE: There are no such ~~special~~ circumstances in this case as existed in the case of *The*

(*) Edwards, 242.

(*) 1 Dodson, 22.

(*) Next case.

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241] *Evangelistria* (¹), *and led the court in its discretion to exercise jurisdiction in that case. I shall order that the action be dismissed with costs, but I shall not give damages.

Solicitors for plaintiff: *Chinery & Aldridge*.

Solicitors for defendant: *Neal & Philpot*.

(¹) Next case.

[2 Probate Division, 241.]

Aug. 8, 1876.

THE EVANGELISTRIA. (E. 298.)

THIS was an action instituted on behalf of Constantine Emperikos, against the Greek ship *Evangelistria*, and against Gianuli N. Piangos and George N. Piangos intervening as defendants under protest.

It appeared by the indorsement of the writ *in rem* that the plaintiff claimed to be the sole owner or mortgagee of the *Evangelistria*, and to be entitled to have possession of the vessel decreed to him, or to have her sold for the repayment of money due to him.

The defendants delivered a petition on protest, alleging, *inter alia*, that the plaintiff and the defendant were subjects of the King of Greece, resident within the kingdom of Greece, and praying the court to pronounce against its jurisdiction, and dismiss the suit with damages and costs.

An answer on protest was thereupon delivered by the plaintiff. Such answer on protest contained, *inter alia*, averments to the effect that in pursuance of a decree of the Court of First Instance at Syra, in Greece, pronounced in a suit instituted by the plaintiff against the defendants, the Greek consular authorities in this country, being the proper authorities in that behalf, dismissed the defendants from the said ship on her arrival at Falmouth, and put her into the possession of a master appointed by the plaintiff; that subsequently the defendants ejected the master so appointed by the plaintiff from the ship, forcibly took possession of her, and at the date of the answer on protest still remained in possession of her against the will of the plaintiff and the said authorities.

August 8. The case came on to be heard on the pleadings on protest before the judge.

Benjamin, Q.C., and *W. G. F. Phillimore*, for the defendants, in support of the petition on protest.

Butt, Q.C., and *E. C. Clarkson*, for the plaintiff.

The acting consul of Greece in London was produced as a witness on behalf of the plaintiff, and, in answer to the court, stated that he had received instructions from the Greek government, and was desirous that the court should exercise jurisdiction in the suit.

The result of the evidence on the other parts of the case appears from the judgment.

[The following authorities, in addition to those mentioned in the judgment, 242] were *referred to on behalf of the defendants: *The Innisfallen* (¹); *The Highlander* (²); *Simpson v. Fogo* (³); 24 Vict. c. 10, s. 11; *The Cathcart* (⁴); and 3 & 4 Vict. c. 65, s. 3.]

SIR ROBERT PHILLIMORE: This case has been very carefully and elaborately argued, and it raises a question by no means free from difficulty, but at the

(¹) Law Rep., 1 A. & E., 72.

(²) 1 H. & M., 195; 1 J. & H., 18; 29

(³) 2 Wm. Rob., 109.

L. J. (Ch.), 657; 32 L. J. (Ch.), 249.

(⁴) Law Rep., 1 A. & E., 314.

same time a careful examination of the matter results in this, that the only question the court has to determine is whether it has jurisdiction to examine into the claims of the respective parties to the suit. The contest is between two foreigners, each claiming possession of the vessel, one contending that he is the actual possessor, and that he had never parted with the property in the ship by sale or otherwise, the other contending that the right to the possession of the ship had passed to him. One of the pieces of evidence which has been submitted to the court is the judgment of the Greek Court of First Instance at Syra in favor of the ownership of the plaintiff. Against this judgment many objections have been taken, but it has been put in force by the Consul-General of Greece so far as it was competent for him to do so, and the Consul-General has expressed his desire that this court should exercise jurisdiction in the matter. Now, it has been contended that this court has no jurisdiction in questions of mortgage, except the jurisdiction conferred by recent statutes, and it has been contended that whatever jurisdiction the court may have respecting mortgages of British ships, it ought not to interfere in questions arising respecting foreign ships. The court, however, has occasionally been in the habit of entertaining suits between foreigners in matters of admiralty law and jurisprudence. In this case the question is whether the plaintiff is not to all intents and purposes the owner of the vessel. In the case which has been cited, *The See Router* (¹), Lord Stowell said that the court never intervenes unless with the consent of the parties or the intervention of the representative of the foreign state, devolving the jurisdiction of his own country on this court, and then he proceeded to consider whether the authority which was produced in that case should be considered equivalent to the consent of an accredited agent, and he said, "Here is a judicial order or decree by the burgomasters and counsellors of the city of Rostock in senate assembled, and in whom the admiralty jurisdiction of that city is said to be vested, directing the master to deliver up possession of the ship to Mr. Martens. This document, officially subscribed by the prothonotary of Rostock, is given under the seal of that city, and its authenticity is not denied on the part of the master. I am of opinion that this instrument arms the court with sufficient authority" (²).

Now, what are the facts of this case? That there is a *prima facie* judgment of a competent Greek court in a matter where two subjects of Greece are concerned, pronouncing in favor of the plaintiff's right to this vessel, and that judgment, whatever its fault may be, has been as I have already mentioned acted upon by the Consul-General of Greece in this country, and he has said expressly that he wishes the jurisdiction of this court to be exercised. Now, without entering into the argument which appears to me to deserve [243 considerable attention as to the provisions in the Judicature Acts with respect to the jurisdiction of the High Court, I think, for the reasons I have stated, that I ought not to decline to exercise jurisdiction so far as to inquire into the position of the respective parties. As it is undesirable that the ship should remain under arrest I should allow the arrest to be removed if bail is given.

Solicitors for plaintiff: *Pritchard & Sons.*

Solicitors for defendants: *Toller & Son.*

(¹) 1 Dodson, 22.

(²) 1 Dodson, 22-24.

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[2 Probate Division, 243.]

May 29, 1877.

THE HORLOCK. (W. 61.)

Co-ownership—Fraud—Bona fide Purchase for Value—Merchant Shipping Act, 1854
(17 & 18 Vict. c. 104) s. 43.

An action of co-ownership was instituted on behalf of G. W. against a British vessel, and against J. H., defendant intervening. The statement of claim alleged, *inter alia*, that by bill of sale duly registered in 1867 the defendant, as sole owner of the vessel, transferred for valuable consideration a moiety of the same to one T. W., and that T. W., by a subsequent bill of sale duly registered in 1876, transferred the said moiety of the vessel to the plaintiff for value. The defendant, in his statement of defence, denied that he had at any time signed a bill of sale transferring any shares in the vessel to the said T. W., and alleged, *inter alia*, that if any such bill of sale had been registered, the same was made and registered fraudulently. At the hearing of the action the registration and execution of the bills of sale were proved. The court thereupon directed that the question whether the fraud alleged could affect the rights of the plaintiff should be raised on demurrer. The plaintiff thereupon demurred to so much of the statement of defence as alleged fraud:

Held, that the demurrer must be sustained on the ground that, the legal ownership in the moiety of the vessel having passed to the plaintiff for valuable consideration by the execution and registration of a bill of sale without notice of fraud, the plaintiff had thereby acquired a title to the same as against the defendant.

THIS was an action of co-ownership instituted on behalf of George Wright against the British ship Horlock and against John Horlock intervening as defendant.

The statement of claim in the action was delivered on the 12th of February last. The first, second and third paragraphs thereof contained the following allegations:—

2. By a bill of sale duly registered on the 11th of June, 1867, the defendant, John Horlock, who was then sole owner of the above named ship Horlock, transferred to Thomas Worraker, of Maldon, in the county of Essex, thirty-two sixty-fourth shares of the ship for the sum of £320.

244] *3. By a subsequent bill of sale, duly registered on the 16th of December, 1876, the said Thomas Worraker transferred his said thirty-two sixty-fourth shares of the ship to George Wright, the plaintiff, for the sum of £175.

The statement of claim then alleged in substance in subsequent paragraphs that the defendant had had the entire management and command of the Horlock from the 11th of June, 1867, down to the time of the delivery of the statement of claim, and had from time to time down to the 24th of September, 1874, rendered accounts of the earnings of the vessel to the said Thomas Worraker, but that no accounts of her earnings had been rendered since that date; that the plaintiff had made several ineffectual applications to the defendant for an account of the subsequent earnings of the vessel; and that the plaintiff was dissatisfied with the management of the vessel and consequently desired that she should be sold.

In the statement of defence delivered on the 19th of February, the defendant, after a denial of the allegations contained in the second paragraph of the statement of claim, alleged in substance as follows:—

2. The defendant never at any time signed any bill of sale transferring any shares whatever of the said ship Horlock to the said Thomas Worraker, and if any such bill was registered as alleged on the 11th of June, 1867, in the said 2d paragraph (which the defendant denies) the same was made and registered fraudulently and without the knowledge, consent, or authority of the defendant.

3. The defendant does not admit the allegations contained in the 3d paragraph of the statement of claim, and says that if the said Thomas Worraker transferred any shares of the said ship to the plaintiff as alleged (which the defendant does not admit) he did so wrongfully and unlawfully, and that he had not any possession of, or right to or in respect of or concerning the said shares.

May 5. The action came on to be heard before the judge in court.

G. Bruce, and *A. H. Poyser*, for the plaintiff.

Charles Hall, and *F. W. Raikes*, for the defendant.

On behalf of the plaintiff the execution and registration of the bill of sale were proved. During the cross-examination of one of the witnesses called on behalf of the plaintiff to prove the execution of the bills of sale, a discussion arose as to whether questions put by the defendant's counsel to the witness for the purpose of ascertaining whether the bill of sale of the 11th of June, 1867, *was not made and [245 registered fraudulently were admissible, and the court directed the question whether the fraud alleged in the statement of defence with regard to the making and registration of the bill of sale of the 11th of June, 1867, could, as a matter of law, affect the rights of the plaintiff, to be formally argued on demurrer. The hearing of the case was therefore adjourned.

Subsequently a demurrer to the statement of defence was delivered; it was in terms as follows:—

The plaintiff demurs to so much of the defendant's statement of defence as alleges that the bill of sale, registered on the 11th of June, 1867, was made and registered fraudulently and without the knowledge, consent, or authority of the defendant, and says that the same is bad in law, on the ground that as it is not alleged that the plaintiff was party to or had knowledge or notice of the said matters alleged, the said matters alleged afford no defence to the action, and on the ground that the plaintiff, having purchased from the registered owner the shares claimed for a valuable consideration and without any notice of fraud, has a good legal and equitable title, and is entitled, notwithstanding the said matters alleged, to the relief sought for in this action, and on other grounds, &c.

May 14. *G. Bruce*, and *A. H. Poyser*, in support of the demurrer: It must be assumed that the plaintiff had no notice of any fraud. The sole question therefore for the court to determine is, whether when a *bona fide* purchaser for value without notice of fraud has become possessed of a

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legal title, his rights can be interfered with on the ground that his predecessor on the register has been guilty of fraud. Now there are many authorities which show that in cases of mistake: *Holderness v. Lamport* ('), *The Rose* ('), or as against one of the immediate parties to a suit whose name has been placed on the register either by his own fraud, or by a fraud of which he has actual or constructive notice, *The Innisfallen* ('); *The Empress* ('); *The Margaret Mitchell* ('); the court has the power to grant, and will, where there has been no laches, grant relief: *Hooper v. Gumm* ('); *Stapleton v. Haymen* ('); *Orr v. Dickenson* ('); *The Princess Charlotte* ('). But all such cases are consistent with the proposition that matters not appearing on the register will not be inquired into to the prejudice of innocent persons, who have acquired an interest in the vessel by purchase for valuable consideration: *Ward v. Beck* (''); *Gardner v. Cazenova* (''); *Bell v. Blyth* (''); *Follett v. Delany* (''). It is a well known principle of equity that from a bona fide purchaser for value without notice, nothing which he has honestly acquired can be taken away: *Scholefield v. Templer* (''); *Pilcher v. Rawlins* (''); *Heath v. Crealock* (''). Not only does this principle apply in the present case, but the 43d section of the Merchant Shipping Act, 1854, is an express declaration by the Legislature, that the registered owner of any shares in a ship has power absolutely to dispose of such shares. The defendant will probably rely upon sect. 3 of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), but the equities there referred to are clearly only such equities as exist between owners and mortgagees. Assuming the bill of sale of the 11th of June, 1867, to have been registered fraudulently, yet the transaction was, at the most, only voidable, *White v. Garden* (''), and the defendant who has lain by so many years cannot impeach it now that the vessel has passed into the hands of a third party.

Willis, Q.C., and *F. W. Raikes*, on behalf of the defendant: Most if not all the shipping cases relied on by the plaintiff were decided previously to the passing of the Mer-

(1) 29 Beav., 129; 30 L. J. (Ch.), 489.

(2) Law Rep., 4 A. & E., 6.

(3) Law Rep., 1 A. & E., 72.

(4) Sw., 160.

(5) Sw., 382.

(6) Law Rep., 2 Ch., 282.

(7) 2 H. & C., 918; 33 L. J. (Ex.), 170.

(8) Johnson, 1; 28 L. J. (Ch.), 516.

(9) B. & L., 75; 33 L. J. (P. M. & A.), 188.

(10) 13 C. B. (N.S.), 668; 32 L. J. (C.P.), 118.

(11) 1 H. & N., 423; 26 L. J. (Ex.), 17.

(12) Law Rep., 4 Ch., 136.

(13) 2 De G. & Sm., 235; 17 L. J. (Ch.), 254.

(14) 4 De G. & J., 429; 28 L. J. (Ch.), 452.

(15) Law Rep., 7 Ch., 259.

(16) Law Rep., 10 Ch., 22.

(17) 10 C. B., 919; 20 L. J. (C.P.), 166.

chant Shipping Act Amendment Act, 1862, and some of them previously to the Merchant Shipping Act, 1854. They can therefore afford little or no guide to what the present state of the law is, unless they are considered together with the provisions of 25 & 26 Vict. c. 63, s. 3. The effect of that section is that although the register book is still to be kept clear from all notice of equitable rights, yet, inasmuch as such rights are no longer to be disregarded, evidence as to what is behind the register must be admissible for the purpose of proving their existence. It may well be, that the plaintiff's name must be retained on the register, but that at the *same time the rights secured to him as registered [247 owner can only be exercised by him as a trustee for the defendant. If the cases referred to on behalf of the plaintiff are considered in order of date, it will be apparent that even before 25 & 26 Vict. c. 63, the doctrine of going behind the register, had become greatly extended, and the same cases read together with sect. 3 of that act, establish that wherever fraud is alleged it is now the duty of the court to look behind the register to the full extent, and decide whether it would not be in accordance with equity that the party complaining of the fraud should not be restored to those rights, which but for the commission of the fraud he would still possess. On this point, the language of the decisions in *Holderness v. Lamport* (*), and *Orr v. Dickenson* (*) is strongly in favor of the defendant. The fact that a legal title has been obtained through a transaction founded on fraud, is not alone sufficient to prevent the interference of a court of equity: *White & Tudor, Leading Cases in Equity*, 3d ed., vol. ii, p. 25; *Donaldson v. Gillott* (*); *Eyre v. Burmester* (*). In the case of *The Empress* (*), decided in the Court of Admiralty, the fraudulent sale of a vessel was set aside, notwithstanding that the purchaser had a legal title.

Poyser, in reply.

SIR ROBERT PHILLIMORE: The question of law to be decided in this case has now been properly raised on demurrer. It appears from the statement of claim that the Horlock was a sailing ship trading between London and Ipswich, that by a bill of sale duly registered on the 11th of June, 1867, the defendant, John Horlock, who was then the sole owner of the Horlock, transferred to Thomas Worraker thirty-two sixty-fourth shares of the ship for the sum of £320, and that by a subsequent bill of sale Thomas Worra-

(1) 29 Beav., 129; 30 L. J. (Ch.), 499.

(2) Law Rep., 3 Eq., 274.

(3) Johnson, 1; 28 L. J. (Ch.), 516.

(4) 19 H. L. C., 90.

(5) Sw., 160.

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ker transferred his thirty-two sixty-fourth shares in the Horlock to George Wright, the plaintiff in the action, for the sum of £175. Now the defendant has delivered a statement of defence containing, amongst other things, a general denial of the allegations of the plaintiff, and alleging that he, the defendant, never at any time signed any bill of sale so transferring any shares whatever in the ship Horlock: 248] *that he never sold any shares to Thomas Worraker; and that if any such bill of sale was registered, or authorized to be registered, it was fraudulently registered and without his knowledge, consent, or authority. Some evidence was taken before the court on the former occasion when these averments underwent discussion, and the court suggested that the more expedient course would be to raise the question of law which appeared to result from the evidence on demurrer; and that suggestion being adopted by the counsel on both sides, a demurrer has been delivered, and the question which I have now to decide is whether such demurrer is a valid demurrer or whether it should be overruled. The demurrer is as follows: [His Lordship here read the demurrer as above set out.]

It is to be assumed, for the purpose of discussing the validity of this demurrer, that the bill of sale of the 11th of June, 1867, was fraudulently made and registered without the knowledge of the defendant, and the question arises whether the plaintiff, who is to be assumed also to have purchased from the registered owner certain shares for valuable consideration and without notice of fraud, has a good legal and equitable title. Now the section, the construction of which governs this case, is the 43d section of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, the words of that section are:—

No notice of any trust, express, implied, or constructive, shall be entered in the register book or receivable by the registrar; and, subject to any rights and powers appearing by the register book to be vested in any other party, the registered owner of any ship or share therein shall have power absolutely to dispose in manner hereinafter mentioned of such ship or share, and to give effectual receipts for any money paid or advanced by way of consideration.

Now a great number of cases which the ingenuity and industry of counsel have furnished to the court have been cited bearing upon the general question of fraud in analogous cases, but I hope it will not be considered any disrespect to the learning and industry of the counsel, to whom I am greatly indebted for their research, if I decline to enter into a consideration of those cases, because the material point in the case must turn upon the plain meaning of the section of the act of Parliament to which I have referred, and in

spite of all that has been said on the more plausible part
*of it there is not much difficulty in its construc- [249
tion. I know of no case which has been cited to me to the
contrary—at all events I am satisfied that the predominance
of authority in the cases cited before me would sustain this
proposition, viz., that a purchaser purchasing from an owner
of registered property for a valuable consideration without
any notice of fraud, and combining therefore a legal and
equitable title, is not liable to have such title impeached on
the ground of fraud to which he was not a party; such
fraud being between the person who at the time of the
purchase appeared on the register as owner and another
person. I should observe here that the ownership is still
registered, according to the bill of sale in question. Now
the law appears to be concisely laid down in the case of
Heath v. Crealock (1), in 1874, by the Court of Appeal in
Chancery. The passage to which I am about to refer con-
tains what was there said by Lord Justice James upon the
general question. That learned judge says:—

With regard to the purchasers, it appears to me that there are two cardinal principles and rules of this court which are involved both on the one side and the other. The first I take to be this, which, in my opinion, is a rule without exception, that from a purchaser for value without notice this court takes away nothing which that purchaser has honestly acquired.

That term in the judgment appears to govern this case. Here is a purchaser for value without notice who has honestly acquired some interest in these shares. His Lordship goes on to say:—

If the purchaser has got possession of a piece of parchment, or of property, or of anything else which he thought he was getting honestly, this court, in my opinion, has no right to interfere with him; and it would be, in my judgment, interfering with him if, through the form of a decree directing a sale instead of a foreclosure, or anything of that kind, it merely did indirectly that which it would not do directly—deprive him of possession of land or deeds in favor of the plaintiff.

I do not know what words can more exactly apply to the present case, and I must presume that to be a correct enunciation of the law; and if that be, generally speaking, a correct statement of the law, it is, if I may so express myself, *à fortiori*, applicable to a case arising under the 43d section of the act in question; because the object of the section, as it appears to me, was to give evidence of title by the name of the owner appearing upon the *register. It is not [250
necessary that I should say that in no case would the court

(1) Law Rep., 10 Ch., 22, at p. 33.

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The Horlock.

inquire into the question whether a bill of sale, as is alleged in this case, transferring shares in a vessel, had been registered in fraud. It is not necessary that I should decide that question; but the question which I have to decide, and which I desire to be understood alone to decide is that, assuming the purchaser in this case to have purchased without notice of fraud for a valuable consideration under this bill of sale and to have so become possessed of these shares, and also, which is a point that should not be omitted, to have got his name upon the register, in such a case it is not competent to the court (to use the phrase used on the argument of this case) to look behind the register for the purpose of dispossessing an innocent purchaser whose name is on the register. He combines, in my judgment, both a legal and equitable title, of which it is not competent to this court to dispossess him. I must, therefore, sustain the demurrer. The costs of the demurrer will be costs in the cause.

May 29. *A. H. Poyser*, on behalf of the plaintiff, moved the judge in court *ex parte* to restrain the defendant "from further mortgaging or creating any charge in or otherwise dealing with any share or shares in the vessel *Horlock*." [He referred to the Rules of the Supreme Court, Order LII, Rule 3 (').]

The motion was supported by an affidavit which, *inter alia*, alleged that during the pendency of the action the defendant had by a registered mortgage mortgaged his thirty-two sixty-fourth shares in the *Horlock*,—the moiety in the vessel not alleged to have been transferred to *Worraker*,—there being at such time a previous mortgage of such shares upon the register; and that unless the defendant was restrained from creating any further charge on the said shares, the said shares would not be of sufficient value to satisfy the plaintiff's claim for the earnings of the vessel from 1874 to the time of the making of the affidavit, and the costs of the action.

THE COURT made an order restraining the defendant in the terms of the motion until the 29th of August, 1877, but 251] *reserving leave to the defendant to move the court to rescind the order (').

(¹) See also 17 & 18 Vict. c. 104, s. 65; 36 & 37 Vict. c. 66, s. 16; and *Nicholas v. Dracachis*, 1 P. D., 72.

(²) No application was ever made to rescind the order. Copies of the order were subsequently served on the solicitor for the defendant and on the registrar of shipping and seamen at the Custom House, London.

June 26. The action was heard.

A. H. Poyser, for the plaintiff, moved the court to order a sale of the vessel.

THE COURT granted the motion.

Solicitor for plaintiff: *F. B. Jennings.*

Solicitor for defendant: *Moss.*

[2 Probate Division, 251.]

July 20, 1877.

[IN THE COURT OF APPEAL.]

CHEESE V. LOVEJOY.

[1876 H. 16.]

Will—Revocation—7 Will. 4 & 1 Vict. c. 26, s. 20—"Otherwise destroying."

A testator drew his pen through the lines of various parts of his will, wrote on the back of it "This is revoked," and threw it among a heap of waste papers in his sitting-room. A servant took it up and put it on a table in the kitchen. It remained lying about in the kitchen till the testator's death seven or eight years afterwards, and was then found uninjured:

Held, that the will was not revoked, the words "or otherwise destroying" in 7 Wm. 4 & 1 Vict. c. 26, s. 20, not being satisfied, as, whatever the testator intended, the will had not been actually injured.

THIS was an action to obtain probate in solemn form of the will, dated the 3d of July, 1849, of John Harris, who died on the 13th of May, 1876, with three codicils, one dated the 3d of July, 1849, and the two others the 21st of September, excluding from the probate all the alterations and interlineations appearing on the will.

That those instruments were originally well executed was not seriously contested. The plaintiff under the will was a beneficial legatee of a considerable part of the testator's personal estate and a devisee of a considerable part of his freehold estate. The heir-at-law and next of kin [252] contended that the testamentary instruments had been revoked.

The evidence as to revocation was to the following effect: The will and codicils were at the testator's death found upon the kitchen table. The testator had drawn a pen through the lines of some part of the will, leaving the words perfectly legible, and had written on the back "All these are revoked." A housekeeper who had been nine years with the testator and left in January, 1876, stated that she had heard the testator speak about his wills, and say he had made two or three, but that he had cancelled them and they were good for nothing, and that the testator had in her

presence taken up this will and thrown it among a heap of waste papers on the floor. The housemaid deposed that she had first seen the document about eleven years ago in the testator's sitting-room under the cushion on the sofa. That about seven or eight years ago the testator kicked it into a corner of the sitting-room among a quantity of other papers, and that she took it out of the sitting-room, where it was lying by the coal-box along with other scraps of paper, and took it into the kitchen, where she put it on the table. That it was sometimes on the table, sometimes on the kitchen window, and sometimes on a chair, just where she chose to put it, but the testator never asked for it, nor was it produced to him again.

The judge, being of opinion that there was no evidence of revocation within the 20th section of the Wills Act, directed the jury to find a verdict for the plaintiff. The principal defendants excepted to this ruling in order to bring the case before the Court of Appeal.

Inderwick, Q.C., and *Middleton*, for the appellants: It is admitted that unattested cancellation with a pen is not enough to revoke a will, *Stephens v. Taprell* (*); but in this case there is an "otherwise destroying" within the meaning of the Wills Act (7 Wm. 4 & 1 Vict. c. 26), s. 20. It is suggested in *Williams' Executors* (*) that the words are satisfied by throwing the will away with the intention that 253] it should perish. Surely if a testator threw his will into a pond with the intention that it should perish there, that would satisfy the statute though some one fished up the document uninjured. Here the will was thrown among waste papers with the intention that it should share the usual fate of waste paper.

[JAMES, L.J.: *Doe v. Harris* (*), a case before the Wills Act, is against you. The testator there threw the will on the fire with the intention of destroying it, but as it was not actually injured by the fire, it was held that there was no revocation as to freeholds. You are letting in all the evils of parol evidence. In *Doe v. Harris* (*) the same will was held to be revoked as to copyholds, a jury finding that the testator had thrown it in the fire with the intention of destroying it; but there was great reason to suspect that the whole story was false.]

The revocation must depend on the testator's act, not upon what ultimately becomes of the paper.

[JAMES, L.J.: Then you must read the clause as "burn-

(*) 2 Curt., 458.

(*) 6 Ad. & E., 209.

(*) 5th ed., p. 117.

(*) 8 Ad. & E., 1.

ing, tearing, or otherwise destroying the same, or doing some act tending thereto, and indicating an intention to revoke."]

Dr. Deane, Q.C., and *Dr. Tristram*, contra, were not called upon.

JAMES, L.J.: We cannot allow the appeal in this case. It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by *Dr. Deane* in the court below, "All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying: there must be the two."

BAGGALLAY and COTTON, L.JJ., concurred.

Solicitors: *Merediths, Roberts & Mills; Bridges, Sawtell, Heywood & Co.*

See 17 Eng. Rep., 543 note; 20 Eng. Rep., 616 note; *Andrews v. Andrews*, Tucker's Select Cases, Newfoundland, 205.

In *Sheridan v. Houghton* (16 Hun, 628), on appeal from a decree of the surrogate of the county of New York, establishing a will of David S. Jackson, which was alleged to have been lost or destroyed after his death, the execution of the will of the alleged testator was shown. It was clearly shown also, that the will existed at the time of the testator's decease; that it was found in his office and read in the presence of his family, and then delivered to one of his sons, David S. Jackson, Jr. It had never been presented for probate, nor was it produced, nor was any account given of the disposition made of it by David S. Jackson, Jr., who was shown to be deceased.

The court at general term, after directing a new hearing before the surrogate for failure to comply with the statute, proceeded: "It appears by the papers that the attorney by whom the will was drawn suffered himself to be retained on the part of the heirs who opposed the probate of the will, and refused to answer proper questions put to him upon the trial, upon the ground that he was not at liberty, having been counsel for the testator, to disclose what he chose to consider confidential communications. The surrogate did

not see fit to require him to testify to such facts in relation to the preparation and the contents of the will, in respect of which he was not only competent but bound to testify. A failure of justice must not be permitted on any such pretext, and we think, upon a new trial, there will be no difficulty in developing such facts as will prevent the failure of clearly manifest justice in this case."

A testator, intending to revoke a will, caused it to be burned. He had already prepared and signed a second will making materially different dispositions of the property. At the time of the burning the second will was not attested, and the testator understood that until attested it would not be complete. It was subsequently attested, and after the death of the testator was offered for probate, but was rejected by the probate court. In an action to establish the first will, held that the burning operated as a complete revocation, and this result was not changed by the fact that the second will never took effect: *Banks v. Banks*, 65 Missouri, 432.

In ejectment, in proof of the existence of a will, one H. swore that she saw the will, giving an explicit statement of its contents, and it also appeared that the devisees, of whom the heir-at-law was one, all submitted to and acted upon it. Held, sufficient evidence of the existence of the will.

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Held, also, that the will was sufficiently proved by the execution and registry by the heir-at-law of a memorial of the will, it being a declaration against his proprietary interest, and he being dead at the time of the trial.

Semble, it was, on this ground, good primary evidence not only against the heir-at-law and those claiming under him, but against third parties.

It appeared that search for the will was made in the office in which it would have been, had it been admitted to probate in the different registry offices of the counties in which the several parcels of land, of which the testator died seized, were situate, among the papers of the owners of the several parcels; among the papers of the only executor of three named in the will who could be found; among the papers of the draftsman of the will, and among those of several of the devisees. Held sufficient to let in secondary evidence of the will: *Brown v. Morrow*, 23 Upper Can. Q. B. Rep., 436.

Where declarations of a testator,

made after the execution of the will, are so remote as not to constitute part of the *res gesta*, they cannot be offered as evidence to prove fraud, or the external acts of undue influence. But where such declarations are sufficiently near in time to justify a reasonable inference that the mental condition which they denote existed at the time of the execution of the will, they may be admitted to prove such mental condition, but for no other purpose. In this case such declarations, made eleven months after the will, were admitted for this purpose.

Testimony as to the mental condition of a testator is admissible under the issues of fraud and undue influence, as well as under that of testamentary capacity.

Declarations, made before the execution of a will, tending to show that the will is either consistent or inconsistent with the wishes and convictions of the testator, are admissible: *Griffith v. Diffenderffer*, 2 Maryland Law Record, 1.

[2 Probate Division, 254.]

Dec 5, 1876.

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*MEYERN V. MEYERN & MYERS.

Apportionment of Damages.

A sum of £5,000 damages was apportioned by the court as follows: £1,500 was settled on the youngest child of the marriage, aged five years, the only one remaining in petitioner's custody; £1,500 was given to the petitioner and also his costs of the suit in addition to those which had been taxed against the correspondent; the balance was invested in the purchase of a life annuity for the respondent, to be paid to her as long as she lived chastely and did not become the wife of the co-respondent; and in the event of her breaking either of those conditions, to be paid to the petitioner.

THIS was a husband's petition for dissolution of marriage, and claiming damages. The cause was tried before Sir R. Phillimore by a special jury, and a verdict was found for the petitioner with £7,500 damages. An application was made for a new trial on the ground that the damages were excessive, and after argument before the full court the application was refused on the petitioner consenting to reduce the damages to £5,000. The co-respondent having brought the £5,000 into the registry, a motion was made for an order for its apportionment. Several affidavits were filed, but the only material facts set out in them were that there were

four children of the marriage: Frederick, aged twenty-six years; Ida, aged twenty-four; Alfred, aged twenty-three; and John Joseph, aged five; that the elder children had left their father and taken part with their mother during the litigation between them, but the youngest child remained with the father; that the petitioner was a banker's clerk with a salary of between £400 and £500 a year, and that the respondent had no means of support or provision for her maintenance. It was agreed that £1,500 should be settled on the youngest child, but the petitioner wished to be allowed to receive the balance of the £5,000, and the respondent wished to have it applied towards the support of herself and of the other children.

Inderwick, Q.C., and *Bayford*, for the petitioner.

Dr. Spinks, Q.C., and *Searle*, for the respondent.

Dec. 5. THE JUDGE ORDINARY: All parties ask that a sum of £1,500 shall be settled on the youngest child of the marriage. I direct that that sum shall be so settled on the child, the money to *go to the father in the event of [255 the death of the child before attaining his majority. I further direct that all the petitioner's extra costs be paid out of the damages, and that a sum of £1,500 be also paid to him; and I direct that the balance of the £5,000, whatever it may then be, shall be applied in the purchase of an annuity for the life of the respondent, to be paid to her so long as she shall live chastely, but that in the event of her forfeiting it by reason of her not living chastely, or in the event of her ever becoming the wife of the co-respondent, then that the annuity be paid to the petitioner for his life. My reason for making this apportionment is this: It appears that the co-respondent is a married man, and it is said that since her separation from the petitioner, the respondent has been supported and visited by the co-respondent. Indeed, I am asked to come to the conclusion that their guilty intercourse has been carried on since the pronouncing of the decree in the suit. My object, then, in making the annuity payable to the respondent, so long as she lives a chaste life, is that she shall have the strongest possible motive to abstain from troubling the married life of the co-respondent and his wife. I do not impose as a condition that the respondent shall not marry again; that, perhaps, would be the best thing that could happen. But, in the event of the co-respondent's wife's dying, and his marrying the respondent, then, as she would have to be supported by him, there would be no reason for her continuing to receive this annuity, and in

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that event it ought to go to the petitioner. I pass over the children, save the youngest, but not because I think they might not be entitled to some share in the damages by reason of their being of full age. I do not think that would be a sufficient reason for passing them over. There might be circumstances under which I should have allowed some portion of the damages to be paid to them, but two of these three children have cast in their lot with their mother, and, in putting her in possession of this annuity, I leave it to her to apply such portion of it to their maintenance as she may think fit, and also furnish another and additional motive for her observance of the conditions which I have named.

Solicitors for petitioner: *Green, Allen & Green.*

Solicitor for respondents: *H. Harris.*

Solicitors for co-respondents: *Travers Smith & Co.*

[2 Probate Division, 256.]

March 26, 1877.

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***MAUDSLAY V. MAUDSLAY.**

Dissolution of Marriage—Variation of Settlements—Power of Trustees to advance Money to Respondent—Power of the Respondent to revoke and reappoint a portion of the Trust Fund—Appointment of new Trustees.

In a suit for dissolution of marriage brought by the wife, a decree absolute having been made, application was made to the court to vary the settlements executed on the marriage of the parties :

Held, that the object of the court, in varying the provisions of a settlement, should be to prevent, as far as may be just and practicable, the innocent party being damaged, in a pecuniary sense, by the decree of dissolution. It will not deprive the father of the power of exercising parental judgment and discrimination with regard to his children, except so far as is inevitable from their remaining in the custody of their mother.

In this case Mrs. Maudslay petitioned the court to dissolve her marriage with the respondent, Athol Edward Maudslay, by reason of his adultery and cruelty. A decree *nisi* was pronounced on the 17th of March, 1875, and it was made absolute on the 9th of November, 1875. On the 21st of February, 1876, the petitioner filed a petition for the variation of the settlements made on her marriage with the respondent, to which he answered on the 13th of September, 1876. The marriage of the parties took place in 1869, and three children have been born thereof : Athol John Maudslay, aged six years ; Reginald Walter Maudslay, aged five years ; and George Archibald Maudslay, aged three years.

The trustees of the settlement are, Charles Thomas Lucas, James Murray, Herbert Charles Maudslay, and Walter Henry Maudslay. The property brought into settlement consisted of £10,000 on the part of the petitioner, an equal sum on the part of the respondent, and he also assigned to the trustees his one-eighth share of and in a moiety of the residuary estate of his father to which he is entitled in reversion expectant on the death of his mother, who is still alive. This one-eighth share is estimated at the value of £15,827 16s. or thereabouts. This assignment was made as security for the fulfilment of a covenant that he would pay to the trustees £10,000 within six months after the death of his mother.

The trusts of the settlement are as to the £10,000 brought into settlement by respondent, and the further sum payable by him on the death of his mother, that the interest thereof should be paid *to the respondent for his life, and [257 the interest of the wife's fortune to her for life. After the death of either, to the survivor for life; after the death of the survivor as to the £10,000 in reversion covenanted to be brought into settlement by the respondent, that it be held upon such trusts for the children of the marriage, or their issue, as the respondent shall appoint. As to the remaining trust funds upon such trusts for the children or their issue as the petitioner and respondent may jointly, or the survivor may appoint. In default of appointment in trust for the children equally, and in the event of no child attaining a vested interest, that the trustees shall stand possessed of the respondent's fortune after the petitioner's death for the respondent absolutely, and of the petitioner's fortune, if she survive the respondent for her absolutely, but if he shall survive her, then as she shall by will appoint, and in default of appointment for her next of kin.

The registrar to whom the petition and answer were referred, after setting out the above facts, further reported, "As to the wife's fortune, it is proposed that an order should be made to extinguish the life interest of respondent, and that the settlement with respect thereto be read as if he were now dead. It is not proposed to interfere with the life interest of the respondent in the money brought into settlement by him, nor with his sole power of appointment over the money in reversion, nor with the joint power of appointment over the £10,000 in possession brought in by him. The wife is desirous, however, that his power of appointment over such last mentioned sum in the event of his surviving her should be extinguished. There are some

provisions in the settlement to which it is necessary to call attention. It is provided, that if after the decease of either husband or wife the survivor shall marry again, he or she may revoke the trusts of the settlement as to the funds brought into settlement by them respectively, and resettlement the funds to the following extent: if one child only attain a vested interest, then to the extent of three-fourths the funds; if two such children, to the extent of one-half; if three or more, to the extent of one-fourth. No child has yet attained a vested interest. The petitioner desires that this power, so far as the respondent is concerned, shall be extinguished. There are three children living, and, therefore, at present the 258] power *extends to one-fourth of the funds. It is submitted whether there is sufficient reason shown for interfering with this power. There is a power to the trustees at their option to advance out of the husband's fortune in possession a sum not exceeding £5,000, and a further direction to them to advance out of the husband's fortune in reversion, or concur in or enable him to raise thereout or out of the securities for the same such further sum or sums as he might require not exceeding altogether the further sum of £5,000 for the purpose of placing the husband in business, and to be secured by his bond. The petitioner desires that the first mentioned power shall be taken from the trustees, and that as to the second it shall be optional with the trustees to exercise it or not. With regard to this I would submit that in the first case there would seem to be no reason for interfering with the discretion of the trustees, who will protect the interest of all parties, and with regard to the second case, I submit to the court whether the husband should be deprived of his right to call for the advance of this money, which may be absolutely necessary to set him up in business. There is also a power to the husband to revoke the trusts contained in the settlement concerning the £10,000 in reversion, and to create new trusts in favor of the wife, and the issue of the said marriage, or such one or more of them to the exclusion of the rest, as he may think proper, and in the event of his surviving his wife, to absolutely revoke all trusts to the extent of one half of such sum. The wife desires that this power may be extinguished, as it will enable the husband to take away her life interest therein. If it does give him this power, I submit that it should be varied to that extent. The settlement contains the ordinary power of appointment of new trustees. It is desired by both parties that this should be varied, and that in the case of either Charles Thomas Lucas, or James Murray, or any

trustee substituted for him or them, dying or ceasing to act, the wife shall have the power of appointment, and that a similar power shall be given to the husband as to Herbert Charles Maudslay and Walter Henry Maudslay. It may be a question whether the court has power to give such a discretion: see *Hope v. Hope and Erdody* (*). The petitioner under the settlement is in receipt of £500 per annum, and it is admitted that *in addition to that she has an [259 allowance from her father of £500 per annum, making a total income of £1,000 per annum. She has the custody of the children. The respondent has £500 per annum from the settlement, and it is not suggested he has any other means. The petitioner asks for £50 per annum for each of the children. Considering that the petitioner's income is double that of the respondent, I would submit to the court that no such order is necessary."

Jan. 16. *Inderwick*, Q.C., and *Searle*, for the petitioner, referred to *Evered v. Evered and Graham* (*).

Dr. Deane, Q.C., and *Bayford*, for the respondent.

Cur. adv. vult.

March 27. THE JUDGE ORDINARY: The marriage of the petitioner was dissolved on the ground of her husband's cruelty and adultery, and a petition for variation of the marriage settlement having been filed, it was referred to the registrar to report upon it. There are three children of the marriage, boys, aged respectively six, five, and three years. On the marriage of the parties in 1869, three sums of £10,000 were brought into settlement—£10,000 by the wife, £10,000 by the husband, and a further sum of £10,000, part of £15,827, to which the husband will become entitled on his mother's death.

The trusts declared as to these several sums were (so far as it is necessary for the present purpose to state them) as follows: As to the £10,000 brought into settlement by the wife, the income is to be paid to her for life, and in the event of the respondent surviving her, to him for life; and after the death of the survivor, upon such trusts for the children, grandchildren, or other issue of the marriage as the petitioner and the respondent jointly, or the survivor, should appoint, and in default of appointment, for the children equally.

As to the £10,000 in possession brought into settlement by the respondent, similar trusts are declared, with the exception that the first life estate is given to the respondent.

(*) Law Rep., 3 P. & M., 226.

21 ENG. REP.

(*) 43 L. J. (P. & M.), 86.

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As to the £10,000 in reversion brought into settlement by the 260] respondent, the income *is to be paid to him for life, then to the petitioner, if she survives him, and after the death of the survivor upon such trusts for the children or their issue as the respondent shall appoint.

I am of opinion that the settlement should be varied as to the £10,000 brought into settlement by the wife, by extinguishing absolutely the interest and powers of the respondent with regard to it, and by authorizing the petitioner to enjoy and deal with it as though the respondent were now dead.

As to the £10,000 in possession brought into settlement by the respondent, I see no reason to make any variation. The petitioner asks that the respondent's power of appointment as to this sum amongst the children in the event of his surviving her should be extinguished; but I do not think that I ought to deprive him of the power of exercising parental judgment and discrimination with regard to his boys. The unhappy events which have led to the dissolution of the marriage of the parents are not calculated to bias his feelings with reference to the children, and I do not think it expedient that the relations of the children with their father should be changed to any greater extent than is inevitable from their remaining in the custody of their mother.

It is further provided, that if, after the decease of either husband or wife, the survivor shall marry again, he or she may revoke the trusts of the settlement as to the funds brought into settlement by them respectively, and resettle such funds in certain proportions according to the number of children who may attain a vested interest. The petitioner desires that this power, so far as the respondent is concerned, shall be extinguished. As I am of opinion that by the terms of the settlement the respondent could only exercise this power in the event of his outliving the petitioner and marrying again after her death, I do not see any reason why he should be deprived of it, as the dissolution of the marriage does not enable him to exercise the power in any greater degree to the prejudice of the children of that marriage than if it had continued until the death of the petitioner.

A power is given to the trustees at their option to advance out of the husband's fortune in possession a sum not exceeding £5,000 for the purpose of placing or advancing the husband in business. I am asked to extinguish this power, 261] but I am of opinion that I *ought not to deprive the

trustees of the right in their discretion to make this advance. They would, no doubt, exercise their power with a due regard to the security of the money to be advanced, and it might very probably be for the interest of the three children of the marriage, who are boys, that the respondent should engage in business. It is not to be assumed, and, as I have already said, I see no reason to suppose that his interest in these children will henceforth cease, and he may be willing, and it may be thought desirable that they or some of them should hereafter be associated with him in some business in which capital may be required.

As to £5,000 of the £10,000 in reversion brought into settlement by the respondent, the trustees are required to advance it at his request, for the purpose of placing him in business. I am asked to deprive the respondent of the right to call upon the trustees to advance this sum. I think, however, that I ought not to do so. Culpable as the conduct of the respondent has been, my functions are not to punish him for it, but merely to prevent, as far as I may think just and practicable, the petitioner being damaged in a pecuniary sense by the dissolution of the marriage, which that conduct has occasioned; but her position and prospects with reference to this £5,000 are in no way altered by the dissolution of the marriage, and it would be a useless hardship upon the respondent to deprive him of the means of engaging in business with this money.

There is a further provision that the respondent shall have power, whether he survive the petitioner or not, by deed or will, to revoke or alter the trusts with reference to the £10,000 in reversion, and to resettle the whole or part in favor of the petitioner, and the children, grandchildren, or other issue of the marriage, or such one or more of them to the exclusion of the rest, as he may think proper. If the meaning of this clause is that the respondent may take from the petitioner her life interest in the £10,000 in the event of her surviving him, I think he ought to be deprived of such a power. I have already expressed my opinion that the respondent's power of appointment over the funds he brought into settlement ought not to be interfered with with reference to his children, because the events which have happened *have no natural bearing on the exer- [262
cise of his parental regard for his children; but the case is different with respect to his wife. The stipulations of the marriage settlement were consented to by her on the supposition that the marriage would continue until the death of herself or her husband, and therefore that this

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power of revocation would be exercised, if exercised at all, under the natural influences resulting from the relation of husband and wife. But the husband has, by his wrongful acts, caused that relation to be put an end to. It has been proved that he has, without justification, withdrawn his affections from his wife, and that he has not only been unfaithful to her, but treated her with unkindness and cruelty. The conditions under which the wife was entitled to expect that the power of depriving her of any interest in those funds would be exercised have been reversed by the misconduct of her husband. In the place of love and union until death, he has brought discord and life-long separation between them. In these altered circumstances he can be no longer trusted to put his powers in action against his former wife with fairness and judgment, and I therefore think it will be proper to extinguish this power of revocation and reappointment so as in any way to deprive the petitioner of the right to an interest for life in the £10,000 reversion in the event of her surviving him. In all other respects I leave the respondent's power of dealing with this fund unaffected, including the power, in the event of his surviving the petitioner, of revoking the trusts as to one half, and re-settling it as he may think proper.

Both parties desire that the provisions of the settlement as to the appointment of new trustees should be altered, and I accordingly vary them by directing that in the case of Charles Thomas Lucas and James Murray, or either of them, or any trustee or trustees substituted for them or him dying or ceasing to act, the petitioner shall have the power of appointment, and that a similar power be given to the respondent in the event of Herbert Charles Maudslay and Walter Henry Maudslay, or either of them, or any trustee or trustees appointed in the place of either of them dying or ceasing to act. It is further asked by the petitioner that an allowance of £50 be made by the respondent for each of the three children. I think that as their incomes are at 263] present equal, and *the petitioner has to maintain the children, this is a reasonable amount for the respondent to pay towards their support and maintenance, and I direct that this sum be paid to the petitioner until further order.

I have disposed of the several matters to which my attention has been called. If further difficulties in carrying out my directions should arise, either party may apply to me in chambers.

Solicitor for petitioner: *J. B. Ballen.*

Solicitors for respondent: *Tattershall & Tattershall.*

[2 Probate Division, 263.]

July 24, 1877.

FENDALL, otherwise GOLDSMID v. GOLDSMID.

*Suit for Nullity—Undue Publication of Banns—Petitioner previously Divorced—
Proper Name.*

The petitioner having obtained a decree dissolving her marriage with the respondent, subsequently remarried him. This second marriage was celebrated after publication of banns, in which the petitioner was described by her name of marriage, she having in the interval between the decree dissolving her first marriage and the celebration of the second usually passed by her maiden name. On an application to annul such marriage by reason of an undue publication of banns:

Held, that a name acquired by marriage can only be superseded by a reputed name in cases where the name had been so far acquired by repute as to obliterate the name acquired by marriage.

ALICE HENRIETTA ANNA GOLDSMID, on the 27th of September, 1875, petitioned the court as follows:—

1. On the 6th of October, 1866, your petitioner (then A. H. A. Fendall, spinster) was married to William Holland Goldsmid in the British Consul's Office at Calais, in France. 2. On the 31st of March, 1869 (this date was erroneous, the decree *nisi* having been made on the 24th of March, 1870, and the decree absolute on the 15th of November, 1870), the said marriage was dissolved by a decree of this court, on the ground of the adultery, cruelty, and desertion of the said W. H. Goldsmid. 3. On the 29th of April, 1872, a ceremony of marriage was celebrated between your petitioner and the said W. H. Goldsmid, at the parish church of St. Botolph, Aldgate, Middlesex. 4. That the banns for the said pretended marriage, celebrated as aforesaid on the 29th of April, *1872, were published in [264 the name of Alice Henrietta Anna Goldsmid, whereas your petitioner had ever since the dissolution of her first marriage with the said W. H. Goldsmid been known by the name of Alice Henrietta Anna Fendall, and your petitioner and the said W. H. Goldsmid were falsely described as widow and widower, and your petitioner and the said W. H. Goldsmid knowingly and wilfully intermarried without due publication of banns.

The petitioner prayed for a decree that the ceremony of marriage celebrated on the 29th of April, 1872, between the petitioner and respondent, is null and void, and that she is free from all bond of marriage with the said W. H. Goldsmid, and further for a decree that the respondent shall pay the costs of and incident to the petition.

On the 12th of November, 1875, this petition, with the

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Fendall v. Goldsmid.

citation, was served upon the respondent at Cape Town, Cape of Good Hope, but he entered no appearance thereto. At the hearing it appeared that the date of the decree dissolving the previous marriage had been erroneously stated in the petition, whereupon

Searle, for the petitioner, asked leave to amend it.

THE JUDGE ORDINARY: I have no objection to the amendment being made, but the petition must be re-served upon the respondent. It will be for counsel to consider how far it will be advisable to do so, when I state that I am of opinion that marriage confers a name upon a woman, which becomes her actual name, and that she can only obtain another by reputation. The circumstances must be very exceptional to render a marriage celebrated in the actual names of the parties invalid. It could only be where the woman has so far obtained another name by repute as to obliterate the original name.

Searle thereupon asked that the petition should be at once dismissed, which was done.

Solicitor: *E. Johnson*.

C A S E S
DETERMINED BY THE
CHANCERY DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
CHIEF JUDGE IN BANKRUPTCY,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE
AND IN
L U N A C Y.

[4 Chancery Division, 693.]

M.R., Dec. 7, 8, 1875: C.A., Nov. 20, 21, 24, 1876.

***EAGLESFIELD V. MARQUIS OF LONDONDERRY. [693]**

[1874 E. 41.]

Railway Company—Misrepresentation by Directors and Secretary—Issue of Preference Stock under a false Description—Mutual Mistake of Law.

The L. Railway Company had power under its acts to issue £100,000 preference shares and a large amount of ordinary shares. By an act passed in 1864, it was amalgamated, together with other companies, with the C. Company, at which time it had issued £85,000 preference shares, which were to rank as No. 1 Preference Stock, and £60,000 ordinary shares, which were to rank as No. 2 Preference Stock, and power was reserved by the act to the C. Company to raise any capital which any of the amalgamated companies had power to raise before the amalgamation. The directors, under a *bona fide* belief that they had power to raise the remaining £15,000 preference shares of the L. Company, and to make them rank with the £85,000 No. 1 Preference Stock, issued £15,000 preference stock, and described them in the certificates, which were signed by the directors and the secretary, as "No. 1 Preference Stock," and some of this stock was purchased by the plaintiffs.

A scheme was filed in Chancery for arranging the affairs of the C. Company, and

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Eaglesfield v. Marquis of Londonderry.

C.A.

it was decided by the court that the new stock was not No. 1 Preference Stock, but ranked below both it and No. 2 Preference Stock.

On a bill being filed by the plaintiffs, alleging that they had been deceived by the form in which the stock had been issued and the certificates made, and praying that the company, the directors, and secretary might be held responsible for the misrepresentation:

Held, by the Master of the Rolls, that the company, and also the directors and secretary, were liable to make good the misrepresentation to the plaintiffs, and either to issue No. 1 Preference Stock to them or repay them their purchase-money.

But the Court of Appeal, being of opinion, on the result of the evidence, that the plaintiffs did not suppose they were purchasing part of the £85,000 No. 1 Preference Stock, but a new stock which ranked with the No. 1 Preference Stock, *held* that the plaintiffs had not been deceived by any misrepresentation of fact, but that there had been a common misconception of law, and they accordingly reversed the decree of the Master of the Rolls, and dismissed the bill with costs.

THE bill in this case was filed by George Eaglesfield, William Harris, and Richard Jefferd Crook, against the Marquis of Londonderry, and Messrs. J. W. Johns, H. Gartside, and R. D. Pryce, directors of the Cambrian Railways Company, and against the Cambrian Railways Company and their secretary, G. Lewis, for the purpose of making the defendants liable for losses alleged to be sustained by the plaintiffs by the misrepresentations of the defendants. 694] *By acts passed in 1853, 1859, 1861, and 1862, the Llanidloes and Newtown Railway Company was authorized to raise a capital of £110,000 in shares, of which £50,000 was to carry a preferential dividend of £5 per cent. This amount of preference shares was accordingly issued.

By the Mid-Wales Railway Act, 1859, and the Mid-Wales Railway (Extension) Act, 1860, the Llanidloes Company was authorized to subscribe £50,000 to the capital of the Mid-Wales Railway Company, and to raise that amount by creation of shares in the Llanidloes Company, of which £25,000 might carry a preferential dividend of £5 per cent.

Under these powers £10,000 preference shares only of the £25,000 were issued.

By the Llanidloes and Newtown Railway Act, 1864, the above stated provisions of the two last mentioned acts were repealed, but it was provided that the repeal was not to invalidate the acts of the company in raising the £10,000 or the power of the company to raise the residue of the £25,000.

By the Aberystwith and Welsh Coast Railway Act, 1861, the Llanidloes Company was empowered to subscribe twenty-five thousand pounds towards the Aberystwith and Welsh Coast Railway Company, and to raise the amount by £5 per cent. preference shares, and preference shares to that amount were shortly afterwards issued.

By the Cambrian Railways Act, 1864, the Llanidloes and

three other companies were consolidated into one company, called the Cambrian Railways Company, with a present capital of £275,000.

Sect. 15 of that act contained a tabulated classification of the shares and preferential stocks which comprised the present capital of the new company, containing, among others, the following items:—

Name and Class of Capital.	Amount percent per annum of Preferential Dividenda.	Amount of Stock or Shares.
Llanidloes No. 1 Preference Capital.....	£ 5	£ 85,000
Llanidloes No. 2 Preference Capital, representing Llanidloes and Newtown ordinary capital.....	5	60,000

*By sect. 29 the Cambrian Railways Company were [695 empowered to raise, as therein provided, such additional capital as they might think fit, not exceeding in the whole £30,000, and also to raise any capital which any of the dissolved companies at the time of the passing of the act had power to raise by the creation of shares or stock and had not raised, and also any capital which by any act or acts of the then present session the dissolved companies, or any of them, were before or after the passing of the acts authorized to raise in like manner as the dissolved companies were or might respectively be empowered or authorized to raise the same.

On the 24th of February, 1865, a special general meeting of the Cambrian Railways Company was held, and a resolution passed by which the company purported to create and issue, under the powers reserved by the Cambrian Railways Act, 1864, the sum of £15,000 additional capital, being the residue which had not been raised of the £25,000 preference capital which by the Mid-Wales Railway (Extension) Act, 1860, the Llanidloes Company was authorized to raise.

The defendant directors were all present at this meeting.

In March, 1865, the whole of this £15,000 new preference stock was issued by the directors to Mr. T. Savin, in part satisfaction of a debt due to him from the company.

The directors and the company acted under the impression that the new stock would rank *pari passu* with the sum of £10,000 previously raised under the powers of the Mid-Wales Railway (Extension) Act, 1860, and the other

stock included in the £85,000 Llanidloes No. 1 Preference Capital. The certificates or coupons issued to Mr. Savin described it as "Llanidloes No. 1 £5 per Cent. Preference Stock issued under the Mid-Wales Railway (Extension) Act, 1860." These coupons were signed by two of the directors of the company, and countersigned by the secretary, Mr. Lewis.

In October, 1865, the plaintiffs, acting through Mr. Eaglesfield, entered into an agreement with Mr. Savin that, in consideration of their transferring to him £10,000 debentures of the Neath and Brecon Railway Company, he should transfer to them £10,000 No. 1 Llanidloes Preference Stock.

Accordingly, on the 14th of October, 1865, Savin executed 696] a *transfer to the plaintiffs of "£10,000 £5 per Centum Preference Stock Llanidloes No. 1 (Act, 1860) of and in the undertaking called the Cambrian Railways Company." In the margin of this transfer was a memorandum, written by the secretary, as follows: "Coupons for £10,000 Preference 1860 Stock forwarded to the company's office by Mr. Savin are held by me to meet this transfer."

The plaintiffs executed the transfer, and ten new certificates for £1,000 each were issued by the company to the plaintiffs. Each of these certificates was headed "No. 1 Cambrian Railways Company, Register No.—, Llanidloes No. 1, 5 per Cent. Preference Stock, issued under the Mid-Wales Railway (Extension) Act, 1860," and certified that the plaintiffs were registered as the proprietors of £1,000. The certificates were signed by two directors, and countersigned by the secretary.

In March, 1866, the plaintiffs received a dividend at the rate of £5 per cent. on their stock, which was described in the counterfoil of the warrant as "Llanidloes No. 1."

In the year 1868, the Cambrian Company being in embarrassed circumstances, an act was passed for the arrangement of their affairs, and in 1870 the company presented under that act a petition to the Court of Chancery, asking for a declaration of the rights of the shareholders; and Vice-Chancellor James then decided that, according to the true construction of the acts of 1864, the holders of the £15,000 preference stock, which was issued under the Cambrian Railways Act of 1864, were not entitled to rank as holders of Llanidloes No. 1 or No. 2 Preference Stock, but only as holders of a stock subject to the prior preference in favor of those two stocks.

In 1871, a scheme of arrangement of the affairs of the company was sanctioned by Vice-Chancellor Bacon under

the provisions of the Railway Companies Act, 1867, and in July, 1873, the plaintiffs presented a petition under the Cambrian Railways Act, 1868, asking that the list of the holders of No. 1 Preference Stock might be settled. An order to that effect was made by Vice-Chancellor Bacon, and the plaintiffs were declared not to be entitled to any of that stock. They accordingly filed this bill, alleging that they agreed to purchase, and supposed, they had purchased, of Mr. Savin "some of that portion of the company's stock which was, in sect. *15 of the Cambrian Railways Act, 1864, [697 designated Llanidloes No. 1 Preference Capital, and which was thereafter designated Llanidloes No. 1 Stock," and that they had been deceived by the form of the certificates issued by the company and signed by the secretary, which contained a misrepresentation of the nature of the stock; and they prayed that the defendants might be declared jointly and severally liable to make good to the plaintiffs £10,000 Llanidloes No. 1 Preference Stock, or to pay them the value of the £10,000 Neath and Brecon debentures at the date of transfer, with interest.

The plaintiff Eaglesfield filed an affidavit in support of the bill, which contained the following statements respecting the alleged misrepresentation and the time when he discovered it. He stated (paragraphs 2 and 3) that he had previously held £5,700 stock of Llanidloes No. 2 Preference Stock, but had had no other dealings in the company's stock, and that he knew that the stocks No. 1 and No. 2 amounted to £85,000 and £60,000 respectively, and that they were of greater value than the 1864 stock, but he did not know how the £85,000 No. 1 Stock was made up.

In paragraph 4, he said, "I have since become aware, in the course of legal proceedings instituted by me, that the £85,000 was the aggregate of certain preference capital under various acts of Parliament, but that I never knew with certainty until the certificate was given by Vice-Chancellor Bacon that the £10,000 stock purporting to be Llanidloes No. 1 Preference Stock which I purchased was not genuine stock of that class."

In paragraph 7, after setting out a letter written by Mr. Fraser, Mr. Savin's partner, offering him £10,000 Llanidloes No. 2 Preference Stock, he said, "In consequence of such last mentioned letter, I shortly afterwards called on Mr. Fraser at Mr. Savine's office. At the interview he spoke to me of the 1864 stock, and recommended it to me, but I told him that I declined to invest in that stock, and, moreover, that I would not make any further investments in the No. 2

Stock above mentioned. I also told him that I was a trustee, and should not invest in any stock other than Llanidloes No. 1 guaranteed, and I finally agreed with him at that interview for the purchase of £10,000 of the Llanidloes No. 1, 5 per Cent. Preference Stock."

698] *In paragraph 14. "As hereinbefore stated, I had no knowledge until the making of the certificate by Vice-Chancellor Bacon that the £10,000 stock so purchased by me as aforesaid was not genuine No. 1 Llanidloes Preference Stock; but in or about the year 1869 some doubt was thrown on its genuineness by Mr. Howell, the then secretary of the Cambrian Company. He, in a letter dated the 11th of June, 1869, addressed to our solicitor, says: 'We are afraid, and are very sorry for it, that Mr. Eaglesfield holds a portion of Llanidloes Stock 1864.' The suggestion contained in the letter, however, and subsequent assertions to the same effect, were not sufficient, in the face of our documents, to raise any serious doubt in my mind as to the genuineness of our stock."

In paragraph 16, after stating the filing of the petition by the plaintiffs under the Cambrian Railways Act, 1868, in July, 1873, he said: "By means of the order made upon that petition, and the list of holders of No. 1 Preference Stock which was settled by Vice-Chancellor Bacon in chambers, and the certificate made in pursuance of such order, it was for the first time ascertained that I and my co-plaintiffs were not, in fact, holders of any Llanidloes No. 1 Preference Stock, and that the said T. Savin was not at the time of the transfer to us, in October, 1865, the holder of any such stock."

In paragraph 21, he said: "Under the circumstances hereinbefore detailed, I and my co-plaintiffs were for several years kept in complete ignorance of our having been deceived as hereinbefore appears as to the kind and character of the stock so purchased by us as aforesaid, and it was not until some time in or shortly after the year 1869 that we had a suspicion of or a reason to suspect the existence of that deception. The existence of it was finally established by means of the proceedings hereinbefore mentioned under our petition to his honor Vice-Chancellor Bacon under the Cambrian Railways Act, 1864, and not before."

In his affidavit in reply, Mr. Eaglesfield stated that he was at the time of the transfer acquainted with the distinction between the No. 1 Preference Stock, the No. 2 Preference Stock, and the New Preference Stock of 1864.

The other plaintiffs had no personal knowledge of the transaction.

*The defendants said that they considered, and [699 had been so advised by the solicitor of the company, who settled the form of the certificates, that the £15,000 new stock would rank with the £85,000 No. 1 Preference Stock in the same way as the £10,000 previously issued under the Mid-Wales Railway (Extension) Act, 1860, did; and they denied all intention to deceive the plaintiffs.

The cause was heard before the Master of the Rolls on the 7th and 8th of December, 1875.

Southgate, Q.C., Davey, Q.C., and Phear, for the plaintiffs: The defendants in this case are jointly and severally liable to make good to the plaintiffs the loss which they have sustained by reason of the representation contained in the certificate that the stock which they purchased was Llanidloes £5 per Cent. Preference Stock. This proved to be a false representation, and, although it may have been made *bona fide*, and not with an intention to deceive, yet the directors were bound to take proper steps to satisfy themselves of the correctness of their representation, and cannot escape from the liability they have thus brought upon themselves: *In re Bahia and San Francisco Railway Company* (¹); *Burrowes v. Lock* (²); *Slim v. Croucher* (³); *Reese River Silver Mining Company v. Smith* (⁴); *Peek v. Gurney* (⁵); *Ship v. Crosskill* (⁶); *Swift v. Winterbotham* (⁷); *Pickard v. Sears* (⁸); *Freeman v. Cooke* (⁹).

Sir J. Holker, A.G., Marten, Q.C., and Cracknall, for the directors: The directors in this case have incurred no liability whatever. There was, according to our contention, no misrepresentation at all. If the several acts of Parliament, namely, the Mid-Wales Railway Extension Act, 1860, the Llanidloes and Newtown Railway Act, 1864, and the Cambrian Railways Act, 1864, are properly construed, the £10,000 stock in question was in fact part of the Llanidloes No. 1 Preference Stock.

*But, assuming that the stock was not No. 1 Preference Stock, but ranked below it, even then it was misrepresentation not of fact but of law. The directors were advised by their solicitor that the stock was of the class which it purported to be, and though they may have been wrongly advised, and have been led to put an erroneous

(¹) Law Rep., 3 Q. B., 584.

(²) 10 Ves., 470.

(³) 1 D. F. & J., 518.

(⁴) Law Rep., 4 H. L., 64.

(⁵) Law Rep., 6 H. L., 377.

(⁶) Law Rep., 10 Eq., 78.

(⁷) Law Rep., 8 Q. B., 244.

(⁸) 6 A. & E., 469.

(⁹) 2 Ex., 654.

construction upon these acts, they cannot on that account be held liable as if they had made a misstatement of fact: *Beattie v. Lord Ebury* ⁽¹⁾.

Further, we contend that, assuming there was misrepresentation of fact as well as law, unless it can be shown that the plaintiffs acted upon it they are not entitled to recover. Now, the plaintiffs were not deceived at all; they do not allege that in the purchase of this stock they acted on any representation of the directors: on that ground, therefore, their case fails.

The directors in this matter, even if they were mistaken, acted *bona fide*, and under the advice of their own solicitor. No case of wilful misrepresentation is made out against them. They would not be liable in an action of deceit, and cannot be made liable by this court: *Swift v. Jewsbury* ⁽²⁾; *Rashdall v. Ford* ⁽³⁾.

Fry, Q.C., and *Speed*, for the Cambrian Railways Company, and for the defendant, George Lewis, the solicitor to the company.

JESSEL, M.R.: The material facts of this case are certainly few in number, and I think the law on the subject is fairly settled.

The case presented by the plaintiffs is one of the simplest possible. They say, "We wanted to buy some preference shares of the Cambrian Railways Company called Llanidloes No. 1 Preference. They were the first preference shares on that portion of the Cambrian system which consisted of a railway formerly called the Llanidloes Railway, and there were such preference shares in existence. Mr. Savin said he would sell to us £10,000 of such stock, and handed to us a transfer of £10,000 No. 1 Preference Stock Llanidloes, which on its face bore the usual certificate (although it differs in a word or two) of the secretary of the railway company, *that the stock coupons had been duly deposited with him by the vendor, and were in the office. On the faith of that transfer we paid for the shares so purporting to be transferred, giving to Mr. Savin a transfer of some debentures of another company, so that it was money or money's worth to Mr. Savin; the transfer was completed at the office, and the usual certificates were sent to us stating that we were the owners of Llanidloes No. 1 Preference, and we received a dividend. But some time afterwards it was discovered that the stock sold to us was not Llanidloes No. 1 Preference Stock at all, but No. 3, and that there were two other stocks before it, so that instead of being

⁽¹⁾ Law Rep., 7 H. L., 102. ⁽²⁾ Law Rep., 9 Q. B., 301. ⁽³⁾ Law Rep., 2 Eq., 750.

worth *par* it is worth little or nothing. The persons who were the cause of our loss may be divided into three sets, using the word "person" to include the company. There was, first of all, Mr. Savin, the vendor, who represented to us that it was Llanidloes No. 1 Preference Stock, when it was not; secondly, the directors, who issued to Mr. Savin coupons or certificates that the stock in question was Llanidloes No. 1 Preference, when it was not; and thirdly, there was the company who authorized the directors."

I think it only necessary to state the main objections, and to give the answer to them. The Attorney-General said, first, there was no misdescription at all: this stock was in fact No. 1 Preference Stock. That was the most important point, because if Mr. Eaglesfield, who acted for his complainants, got what he bargained for, he has nothing to complain of. There was a preliminary difficulty in the Attorney-General's way, which was this, that Vice-Chancellor James had decided that the stock in question was not No. 1 but No. 3 Preference Stock; and a decision which, as the decision of a judge of co-ordinate jurisdiction, I should follow without question, unless it were either opposed to the general current of authority, or against the plain meaning of an act of Parliament. I have gone through the act, and I am not only satisfied that the decision of Vice-Chancellor James was correct, but also, I think it a very plain case, and that a little attention on the part of the directors and their solicitor would have led them to the same conclusion. It does not follow that the solicitor was to blame for having made this mistake.

[His Lordship then stated his view of the construction of the *Mid-Wales Railway (Extension) Act, 1860, the [702 Llanidloes and Newtown Railway Act, 1864, and the Cambrian Railways Act, 1864, with reference to the question in the suit, and held that the £10,000 stock was not Llanidloes No. 1 Preference Stock, but that it was at the best No. 3 Preference, though in reality it ranked below all the preference stocks mentioned in the Cambrian Railways Act, 1864, which were prior charges on the separate portions of the Cambrian Railway system, and on its general revenue. His Lordship continued:]

The misrepresentation is contained in the certificate of proprietorship which two of the directors signed. I am glad the board do not attempt to throw the blame on the two directors who did sign it, but say they all authorized it. The certificate is a certificate that Savin is the proprietor of £10,000 of the Llanidloes No. 1 £5 per Cent. Preference

Stock issued under the Mid-Wales (Extension) Railway Act, 1860.

It was put to me that this was a misrepresentation of law and not of fact. It was said the company and the directors did not know their acts of Parliament, and their solicitor had told them this, which they believed, that the new £15,000 Preference Stock would be and be treated as part of the Llanidloes No. 1 Preference Capital, and rank and stand upon the same footing in all respects as the £85,000 Llanidloes No. 1 Preference Stock.

Of course, solicitors can give wrong advice as well as other people, and I have no doubt he did think that this would rank as part of the Llanidloes No. 1 Preference Stock. But does that make it a misrepresentation of law? A misrepresentation of law is this: when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact, which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, "You may, she is a single woman of large fortune." It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void, though 703] it *had not been declared so by any court, and it afterwards turned out they were all mistaken, that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story, and all the facts, and said, "Now, you see, the lady is single," that would have been a misrepresentation of law. But the single fact he states, that the lady is unmarried, is a statement of fact, neither more nor less; and it is not the less a statement of fact, that in order to arrive at it you must know more or less of the law.

There is not a single fact connected with personal status that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first-born son after the marriage, or, in some countries, before. Therefore, to state it is not a representation of fact seems to arise from a confusion of ideas.

It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of £10,000 a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to £10,000 consols involves all sorts of law. Therefore this is a statement of fact, and nothing more; and I hold the argument to be wholly unfounded which maintained that it was a statement of law.

The next point was, that, if it were a misrepresentation of fact, Mr. Eaglesfield did not act, and does not say he acted, on the misrepresentation. Here, again, I think the argument void of foundation. The document in question, the coupon or certificate, is the only evidence of title which the vendor of railway stock has. If he goes to sell his stock, it is the only thing he can hand to his broker. The purchaser has no right to inspect the share register, which is the other evidence of title, and in practice he cannot inspect it. I add the words "in practice," because in the similar case of court rolls, the purchaser can in practice inspect if the steward will allow him. The purchaser of railway stock *cannot satisfy himself of the vendor's title by any- [704 thing more than this, that the vendor has the certificates, and those certificates are lodged at the office, so that the secretary has notice that the certificates are so lodged for the purpose of meeting the transfer. With the transfer, the purchaser has got all he can obtain, and all he does obtain in practice, and he hands over his valuable consideration in exchange for the transfer, and the notice that the certificates are lodged. The very thing for which he gives his money is not merely a transfer, but a transfer *plus* certificates or coupons duly lodged. To say he does not act on the certificate is to say the whole transaction is to go for nothing. You might as well say that a man who buys land, and has an abstract of title furnished to him, does not act on the abstract after he has accepted the title and taken the conveyance. It is the very foundation of the transaction; and it appears to me it was not necessary for Mr. Eaglesfield to swear to any such thing.

The next point is this: It was said that, at all events, the directors are not liable if they *bona fide* believed the correctness of the representation. That they *bona fide* believed it, and were entitled to believe it, it is reasonable to believe. They are acting on the advice of their confidential solicitor.

It may well be that an action of deceit could not be maintained against them. But that is not the point. The point is, whether they are liable in this court. Let us first look at the thing independently of the decisions.

Persons state a material fact to induce another person to act, and they state it untruly. They are careless, and being ignorant, they are ill-advised; but they do state the material fact untruly, on which the other person acts. It is intended that other persons shall act on it. The certificate is given to Mr. Savin to enable him to transfer his shares and sell them in the market. The object is, that he shall induce some other person to act on it. Is it in a civil court to be said, that the man who either through carelessness or negligence so misleads another as to induce him to part with valuable property, is not to be liable? Is he not to be liable, because he was misled by the advice of his solicitor? In all transactions in which men are liable they must choose their agents, whether legal or otherwise; and, having chosen them, they are responsible for their acts.

705] *The whole doctrine of equity depends on this. There is no more reason for excusing the man who acts on the advice of his solicitor in this way than there is for excusing the man who defends an action on the advice of his solicitor, and loses it, from paying the costs. Even in a criminal court it is no defence. If a man is indicted for obstructing a highway, he will not the less be found guilty because his solicitor advised him it was not a highway, and had never been dedicated to the public. Nor in any other case could it be alleged that a man is not to be held responsible for acting on advice which may have been given *bona fide*, but is not sound.

Again, in a civil court, what is it to the person defrauded that the person who made the false statement did not take sufficient care? If there are facts on which advice is wanted, or which raise a doubt, the directors should have put the substance of the resolution on the certificate, and then the purchaser would take the responsibility of seeing whether the legal result did or did not follow from the real facts of the case. There was no compulsion on the directors to make a statement that there was stock of such a date; and I see no reasonable ground for exempting them from the consequences of a voluntary statement which turns out to be untrue, and has misled another person.

It appears to me, therefore, on the reason of the thing, that even if there were no authority, the directors ought to be held liable. But there is a great deal of authority on the

subject. Take the well-known case of *Burrowes v. Lock* (*). The utmost that can be made of that case was that the trustee had forgotten an incumbrancer's notice of a title to stock. But suppose you carry it a step further, and show that the trustee had had actual notice of an assignment, but his solicitor had told him that the assignment was invalid for want of a seal on the deed, and consequently he did not say a word about it. He would be in a worse position as regards argument, for it would be said, Why did you not say you had notice of a thing called an assignment, and then you would have been safe; why did you take on yourself to decide the thing in this way? It appears to me, therefore, that the present case is stronger than *Burrowes v. Lock*.

*Again, in the case of *Slim v. Croucher* (*), the [706 man had simply forgotten what he had done. Would he have been better off if, instead of forgetting that the lease had been granted, he had remembered the fact, but had been told by his solicitor that it was void, and therefore omitted to mention it? Again, in *Peck v. Gurney* (*), Lord Cairns says: "My Lords, we were pressed very much in argument with considerations as to the motives of those who made this statement, and it was pointed out with great accuracy that upon a trial in the nature of a criminal proceeding it had been held that they" (that is, the directors of Overend & Gurney) "were not chargeable with that which was laid to their charge."—I may mention this, that it was a criminal proceeding in which the alleged guilty intent was part of the crime.—"My Lords, I must say that, so far as I understand the case, I entirely agree with the result at which the jury arrived in that proceeding; and, strange as it may appear, I think there is a great deal in the papers before your Lordships to show that the gentlemen who formed this company were themselves, judging by the extent to which they embarked their means and continued their property in the concern, laboring under the impression that this transaction, disastrous as it ultimately turned out, had in it the elements of a profitable commercial undertaking; and so far as motive is concerned they may be absolved from any charge of a wilful design or motive to mislead or to defraud the public. But in a civil proceeding of this kind all that your Lordship have to examine is the question, Was there or was there not misrepresentation in point of fact? And if there was, however innocent the motive may have been, your Lordships

(*) 10 Ves., 470.

(*) 1 D. F. & J., 518.

(*) Law Rep., 6 H. L., 409.

will be obliged to arrive at the consequences which probably would result from what was done."

In another case of *Reese River Silver Mining Company v. Smith* (') Lord Cairns says: "When I say 'a fraud,' I do not enter into any question with regard to the imputation of what may be called 'fraud' in the more invidious sense against the directors. I think it may be quite possible, as has been alleged, that they were ignorant of the untruth of the statements made in their prospectus. But I apprehend 707] it to be the rule of law, that if persons *take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue."

Here the defendants say, and say with truth, that what they did they did on the advice of their solicitor. I am not going to say a word that will annoy them, or injure them as regards their position in the world as honorable and honest men. I have no doubt that, as they say, they were ignorant, and did what they did on the advice of their solicitor, and with no intention to deceive or defraud anybody. But I must nevertheless hold them responsible to the same extent as if they had actually known that what they were stating was really, as it was in fact, untrue.

Then it was said that Mr. Eaglesfield was not aware of the misdescription. It was said by the secretary that Mr. Eaglesfield had the Railway Acts in his possession, and could have found out for himself, and must have known that the stock was not issued until 1864. All I say is, that he could not have found it out from the Cambrian Railways Act, 1864. That act did not tell him about any of these distinctive marks; it showed him that there was £10,000 stock issued under the Mid-Wales Railway (Extension) Act, 1860, and nothing more. The register itself, if he could have got to it, which he could not, would not have told him anything more. The register described it as Llanidloes No. 1 Preference Stock under the Mid-Wales Railway (Extension) Act, 1860. Up to June, 1865, it was described as Llanidloes Preference Balance under Mid-Wales Railway (Extension) Act, 1860, which was more really accurate; but the actual entry at the time of Mr. Eaglesfield's purchase was as I have stated, and would, standing alone, have induced anybody to believe it was the very £10,000 stock created under the original resolution.

That disposes of all that I can call the substantial argu-

(') Law Rep., 4 H. L., 79.

ment on the part of the directors. It appears to me, as far as they are concerned, that argument ought not to relieve them from liability to make good the representation.

The same observations apply to the secretary. I should have been willing, with the consent of the plaintiffs, to have dismissed the bill as against him without costs on account of his subordinate *position; but as they do not con- [708 sent, the decree must go against him.

The only other defendant is the company. I have listened to a very ingenious argument from the learned counsel who appeared for the company. The ordinary rule is plain. An agent acting within the scope of his authority, whether special or general, makes his principal liable, and not the less liable because the agent himself may be liable.

Take this illustration: A coachman who, by his negligence in driving his master's carriage, runs over a child, is liable to an action at the suit of the child, and the master is also liable. I apprehend that under the new practice they might be joined as defendants. Of course the coachman is not usually sued, because he is not worth suing; but if he came into a fortune, and became a defendant good for costs and damages, there is no reason why he should not be sued. But it does not follow that because he is liable the principal is not. The principal is still liable if the act was done in the ordinary course of the agent's employment.

There will be a declaration that the defendants are jointly and severally liable to make good to the plaintiffs their representations, or, if they are unable to do so, to place the plaintiffs as far as possible in the same position as they would have been in if the representations had not been made.

From this decision the defendants, the directors, appealed. The appeal was heard on the 20th, 21st and 24th of November, 1876.

Cotton, Q.C., *Marten*, Q.C., and *Cracknall*, appeared for the appellants.

Fry, Q.C., and *Speed*, for the company and the secretary.

Southgate, Q.C., *Davey*, Q.C., and *Phear*, for the plaintiffs.

The view taken of the case by the court renders it unnecessary to state the arguments as to the liability of the directors or the company for the alleged misrepresentation. The same line of argument was pursued as at the hearing before the Master of the Rolls. *In addition to the cases [709 then cited, the following were referred to: *Hart v. Frontino*

Gold Mining Company ('); *Henderson v. Lacon* ('); *Scott v. Dixon* ('); *Barry v. Croskey* ('); *Mackay v. Commercial Bank of New Brunswick* ('); *New Brunswick Railway Company v. Conybeare* ('); *Haycraft v. Creasy* ('); *Ormrod v. Huth* ('); *Stephens v. De Medina* ('); *Western Bank of Scotland v. Addie* ('); *Barwick v. English Joint Stock Bank* (').

JAMES, L.J.: I am of opinion in this case that the order of the Master of the Rolls cannot be affirmed.

The plaintiff, Mr. Eaglesfield, alleges that the defendants, the directors and the secretary, made a misrepresentation to him, and that he was deceived by that misrepresentation of the defendants. Now it is not necessary, in the view which the court takes of the case, that we should distinguish between the respective liabilities of the secretary and of the directors and of the company, or go into any examination, which would be otherwise necessary, of the extent to which the misrepresentation, if misrepresentation there be, is brought home effectually so as to be accompanied with legal consequences to the company, to the directors or to any of them, or to the secretary. But there is a part of the case that is common to all which lies at the root of the plaintiff's contention in this matter, which is, that there was a misrepresentation made to him, and that he was deceived by means of that misrepresentation. Of course the misrepresentation, if misrepresentation there be, must be a misrepresentation of a matter of fact, and not a misrepresentation in terms applicable to a matter of law, as to the legal consequences of the true facts. Now, as between the plaintiff and the company, up to and at the time of the completion of his transaction with Savin, the only thing brought home to the company, the directors or the secretary, is this: Savin being 710] the *possessor of certain stock in the defendant company, as to which Savin at that time had no certificates at all, and as to which certain certificates were issued, but which certificates had never been shown to, or read to, or in any way communicated as certificates to the plaintiff—Savin sells some stock to the plaintiff, and a transfer is sent to the company as a transfer of "£10,000 (say ten thousand pounds) of 5 per Cent. Preference Stock Llanidloes No. 1 Act, 1860;" that being the description in the body of the

(') Law Rep., 5 Ex., 111.

(') Law Rep., 5 Eq., 249.

(') 29 L. J. (Ex.), 62, n.

(') 2 J. & H., 1.

(') Law Rep., 5 P. C., 394.

(') 9 H. L. C., 711.

(') 2 East, 92.

(') 14 M. & W., 651.

(') 4 Q. B., 422.

(') Law Rep., 1 H. L., Sc., 145.

(') Law Rep., 2 Ex., 259.

certificate; and then there is written across that, "Coupons for £10,000 (Preference 1860 Stock), forwarded to the company's office by Mr. Savin, are held by me to meet this transfer." That was the whole representation which was directly or indirectly made by anybody on behalf of the company to Mr. Eaglesfield, and the only thing by which he could possibly have been misled. It is suggested he was misled before he completed the transaction as between him and Savin.

Now, the facts are these: There was a certain sum of £85,000 No. 1 Preference Stock, referred to in the act of 1864, sect. 15, that is, the Cambrian Railways Act. That same act had reserved, upon the amalgamation of all the existing lines into the new aggregate, the power of issuing all the stocks, preference and otherwise, which had not been previously issued by the dissolved companies themselves under the powers of their acts, and, among others, there was a power in the act of 1860 unexhausted, to issue £25,000, of which £10,000 had been issued, and £15,000 still remained to be issued. With regard to that the Cambrian Railways Company took upon themselves to issue the remaining £15,000, and the directors say (and there is no reason to doubt what they say) that they were advised that the unissued preference stock of the Llanidloes Railway (which was originally upon the same footing as that which had been issued, that is to say, the £10,000) could still be issued as having the same preference as the £10,000, and therefore that it was entitled to be No. 1 Preference Stock of that line. They say they were so advised, and they say, further, that they were advised by their solicitor that the proper mode of describing that stock was "Llanidloes No. 1, 5 per Cent. Preference Stock issued under the Mid-Wales Railway Extension, 1860." They acted upon that. Well, then, what came back to the secretary was a statement [711] that Savin had sold to the plaintiffs £10,000 5 per Cent. Preference Stock No. 1 Act, 1860, and the secretary sends back to the person who sent him in that transfer the receipt, thus: "Coupons for £10,000 Preference 1860 Stock, forwarded to this company by Mr. Savin, are now held by me to meet this transfer." The secretary was not making any representation beyond meaning it to apply to the stock of £15,000 which had been issued by the Cambrian Railways Company. The defendants swear that they never had the slightest intention of making any misrepresentation, and that when they issued the certificate to Savin, which the plaintiff has nothing to do with, except so far as the sub-

stance is given in this document, and the extent to which it is given, they believed they were giving that which they honestly and fairly might give, as distinguishing the new stock of £15,000 which they had issued.

Now, in order to maintain the case of misrepresentation against them, it appears to me that the representation must be wilful and fraudulent. Whether the fraud is supposed to be a fraud in this court as distinguished from moral fraud or not, there must be a wilful and fraudulent statement of that which is false to maintain an action of deceit. It is very difficult to say that directors who acted in this way had any intention to deceive.

But then what appears to me conclusive of this matter is, that the plaintiff himself has not suggested that he was in the slightest degree misled by that which he alleges now to have been a misrepresentation. He was dealing with Savin, and to what extent he knew the stock was stock which Savin was getting as contractor, I do not know, and it is not very material, but his contention is that he was told in substance that he was getting part of the £85,000 stock which was mentioned in a particular section of that act, and that he did not get it. Now, he never in so many words pretends that he did believe he was getting part of the £85,000 stock. He does not say that he was deceived by the company telling him he was getting part of the £85,000, or that anybody told him so. He says, he thought he was getting "genuine No. 1 Stock," that is to say, that he was getting stock which he believed from the documents furnished to him would rank with and be for all practical purposes genuine No. 1 Stock. If his contention were true 712] *(which of course was a desperate one), that they did in fact rank as No. 1 Stock, then he was getting No. 1 genuine Preference Stock of the Llanidloes Railway. The secretary of the defendant company, Mr. Lewis, in his affidavit, having referred to the sort of argumentative statement of deception which the plaintiff put forward in his first affidavit, says this: "I believe that no deception was practised on him by any person whatever, but that, on the contrary, he knew the nature of the stock he purchased of Mr. Savin." He does not in any way controvert that; the only way in which he meets that which goes to the very root of his case is this: "With reference to paragraph 20 of the affidavit of George Lewis, I repeat that I did not, when I purchased and took a transfer of the £10,000 stock to which this suit relates, know or suspect that it was anything but genuine No. 1 Stock." Now, if he had been told every

word that had passed—if the whole resolution of the company had been read to him, and the form of the certificate and everything that occurred in the case had been known to him, he could still have sworn with most perfect truthfulness that he did not know or suspect that it was “anything but genuine No. 1 Stock.” Of course he believed then, and for long afterwards, that notwithstanding the circumstances under which it was issued, it was genuine No. 1 Stock; that is to say, stock that would have a preference and would take rank as being entitled to the first dividend. The meaning of “No. 1 Preference Stock” is that he is entitled to the first dividend, and if he had been told so by Savin, Savin falling into the same mistake as the directors had fallen into, he could still have sworn with perfect truth that he never knew or suspected that it was anything but genuine stock. In my opinion that is very far from making out the case that there was any deception practised upon him, or that he was deceived, or that there was any representation made to him by which he was deceived.

Then another thing is this: he says, according to his own account, that he, and also his solicitor, knew everything about it in 1869. The very facts were told to him 1869, and the doubt and difficulty was that up to a certain period in 1869 the stock had been treated as genuine by the company, dividends had been paid upon it as genuine stock, everybody supposing that it was entitled to a *pref- [713 erence. In 1869 the acts of Parliament were more carefully looked into, especially with reference to the state into which the company had got, and then the solicitor for the company says: “I believe you have not got No. 1 Preference Stock really, but that it can only rank as stock issued under the act of 1864.” Then the plaintiff’s solicitor writes back to ascertain what the facts are, and the facts are all communicated to him. He still goes on hoping that, notwithstanding all that, these documents would give him No. 1 Stock, and from 1869 to the filing of this bill in 1874 he keeps this stock in his hands, avails himself of all the rights of it, and then asks that the stock may be taken off his hands and value given for it, he having kept it for all those years without making any claim. Upon that alone it would be impossible for him to maintain his suit to give him shares other than those he was dealing with. However, I rest my decision upon the fact that he has failed to prove that which is the essence of the case, namely, that he was in any way deceived by anything said to him.

BAGGALLAY, J.A.: The facts of the case have been so fully and frequently dwelt upon in the course of the argument, and by the Lord Justice in his judgment, that I do not propose to refer to them again. As regards the alleged misrepresentation, the directors and secretary state in the 14th paragraph of their answer that they believed that the £15,000 preference stock would be and be treated as part of the Llanidloes No. 1 Preference Capital, and rank and stand upon the same footing in all respects as the £85,000 Llanidloes No. 1 Preference Stock there referred to, being the balance of the £25,000 originally authorized to be raised as preference stock under the Mid-Wales Railway Act of 1860, and which was authorized to be issued, notwithstanding the amalgamation of the companies by the Cambrian Act of 1864. Upon the evidence which is before us, I am of opinion that the plaintiffs, or rather the plaintiff Eaglesfield, who alone attended to the transaction, believed the same thing at that time. I am aware that the bill states a different belief, and is based upon a different belief from that which the directors and secretary say they were under. The belief under which the plaintiffs acted, as stated in the bill, is to 714] be found in the 15th, 22d *and 41st paragraphs. In paragraph 15 they say, "The £10,000 stock so purchased by the plaintiffs as aforesaid from the said Thomas Savin was purchased by them from him at par, and as being Llanidloes No. 1 Stock, and it has never since been dealt with by them." In the previous 11th paragraph they had stated that the capital raised under the 15th section of the Cambrian Act of 1864 was in the afterpart of the bill referred to as Llanidloes No. 1 Stock, that is, the £85,000. So here we have an allegation on the bill that the plaintiffs believed that the stock they bought was part of the £85,000, and if they believed this upon a representation by the defendants that such was the case, there would have been a misrepresentation of fact. They put a similar statement in the 22d paragraph where they say that "they intended to, and believed that they had, become the owners of £10,000 Llanidloes No. 1 Stock," that is, part of the £85,000 stock; and in the 41st paragraph they say that when they completed the transfer they believed it to be £10,000 part of the Llanidloes No. 1 Stock. Therefore, we have these three several assertions, the truth of which it was of the greatest possible importance to the plaintiffs to affirm, and yet none of them are supported by the affidavit made by the plaintiff Eaglesfield. When I find the statements in the bill, as to the belief of the plaintiffs, occurring three several times, and

that not one of these three paragraphs is affirmed by any statement in the affidavit, it becomes, I think, a very suspicious circumstance. As regards the first of the three allegations, namely, that when the plaintiffs purchased the £10,000 stock they believed it was part of the particular stock referred to, the paragraph of the bill containing it comes between two other paragraphs, both of which are verified by affidavit, though it is not verified. With regard to the 22d paragraph of the bill, they verify it in part, but omit to verify that portion of it which states that they intended to, and believed that they had, become the owners of £10,000 Llanidloes No. 1 Stock. The statement in paragraph 41 also is unsupported by affidavit. The bill was framed upon that alleged belief, but Mr. Eaglesfield found that as an honest man he could not make an affidavit up to that which was alleged in the bill, and therefore a variety of statements are used, such as that he negotiated upon that footing, *and that he did not suspect, and so [715 forth, but which studiously abstain from saying he did so believe. If it stood upon that evidence alone, the court would be justified in holding that, the burden of proof being on the plaintiff to show that he had been deceived, he had failed to prove his case. But when I regard his subsequent conduct this becomes still more clear. In the 21st paragraph of his affidavit he states, "It was not until some time in or shortly after the year 1869 that I had a suspicion of or a reason to suspect the existence of that deception." So that, taking any meaning of that clause, whether it was self-deception, or deception by any other person, he became aware of this deception five years and more before the bill was filed. I am not prepared to say that in an action for damages for misrepresentation the delay of five years in commencing the action would necessarily be a bar to the claim, but I do say that in proceedings against a company to set aside a contract on the basis of misrepresentation discovered by the party five years previously, and no proceedings taken to set the transaction aside, such delay must be fatal to the plaintiffs' case. If the plaintiffs were deceived they were at any rate undeceived by the proceedings that took place before the Vice-Chancellor in 1870, and by the communication that passed between the solicitors; but surely if they had believed that they had been deceived by the company, the directors, and the secretary, that was the time when complaint ought to have been made. There was nothing done for several years. They continue to conduct proceedings for the purpose of establishing their right to

that which they originally believed they had. They take their chance of succeeding in establishing that this £10,000 should be held to rank equally with the £85,000 as they originally thought it would, but it is only when they find that that which they thought would rank with the £85,000 is not to rank with it, that this case of misrepresentation by the defendants is set up for the first time. I am, therefore, of opinion that both these appeals should be allowed, and the bill dismissed with costs.

BRAMWELL, J.A.: I am of the same opinion. The plaintiffs might have presented their case in either of two ways. 716] They might have said that they *knew they were getting a portion of this £15,000, and no part of the £85,000, and have complained of the misrepresentation as to the nature and rights of what they got. They would then have been met with this answer, that that was not a misrepresentation of any fact, but a misrepresentation, if at all, of a matter of law—a misrepresentation, or rather a misconception, in which they shared. The other way of presenting the case was the one which Mr. Davey told us this morning they relied on, that is to say, that the plaintiffs supposed they were buying £10,000 of the £85,000 No. 1 Preference, when in point of fact Savin had it not to sell, as the defendants all knew, and therefore a fraud was practised upon them, because Savin was proposing to sell a thing which he had not, and that to his knowledge and the knowledge of everybody else. The burden of proving that is undoubtedly on the plaintiffs. They must prove that they supposed, and had reason to suppose, that they were buying a portion of this £85,000. If they could prove that, the rest would follow, because undoubtedly Savin knew he had it not, and the company and the officers must have known he had it not also. In my opinion the plaintiffs wholly fail to prove that. I doubt very much whether they have alleged it in such a way as to pin themselves to it. It is a remarkable thing the gingerly way (for I know no other word to use) in which the bill states what they thought it was they were buying. Eaglesfield says he purchased from Savin £10,000 of the stock of the Cambrian Railways Company, "which was in sect. 15 of the Cambrian Railways Act, 1864, designated Llanidloes No. 1 Preference Capital." It is consistent with that that he knew he was buying £10,000 stock which was preference capital, and which was of the same quality as that which is called in sect. 15 No. 1 Preference Capital. A similar remark is applicable to the 15th and 41st paragraphs of the bill. To my mind it is very doubt-

ful whether he states it, but it is absolutely certain he does not swear to it, as has been pointed out already. It is impossible that he could have believed it, because he had had dealings with this company and with Savin before he had made purchases of him, and knew his position, and in what way he had become possessed of stock of this character, and also was acquainted with the act of Parliament. The story, therefore, *is impossible. The form of [717 the transfer must have shown him that there was something peculiar about this, because there were certain words in it which were not strictly applicable, as it appears to me, to this No. 1 Preference Stock as described by sect. 15. Then, in addition to that, there was that which has been pointed out, and is so forcible, that although the secretary, in his affidavit, had sworn that, to his belief, the plaintiff Eaglesfield knew well he was not buying a portion of this £85,000, all Eaglesfield does when his attention is particularly challenged on that matter, and when it was open to him to have said in answer, "You are wrong, I did not know at all," is to say, "I thought I was buying No. 1 Llanidloes 5 per Cent. Preference."

Then there is another thing which has also been pointed out, and, indeed, I should say nothing about the matter (because I do not know that I add anything to what has been said before), except that in differing from the opinion of the judge in the court below I think it is better not to give a mere acquiescing judgment. The other point is this: The plaintiff allows five years to go by from the time, not when he found out merely that a statement had been made as to the rights of the stock he bought, but, if his case is a true one, from the time when he was informed that he had not had transferred to him that stock which he thought he was buying—that Savin had it not, and that the company ought not to have made any such statement concerning it. He allows five years to pass without complaint. In the year 1863, five years before the bill was filed, he must have known, if his case is true, that an actual fraud and deception had been practised upon him, or, at all events, that by some strange mistake while he thought he was buying one stock Savin thought he was selling another.

If this case had gone before a jury to be dealt with as men of the world would deal with a charge of this description, I should say they would have scouted the notion that this gentleman had been in any way deceived. It may be that there has been a misrepresentation. As to that I say

nothing at all, but if there has been a misrepresentation at all it is not a misrepresentation that he was getting this stock, but a misrepresentation, under a misconception in which he shared, as to the rights of the new £15,000 stock. But I am of opinion that the plaintiff has wholly failed to 718] make *out that he bought and thought he was getting a portion of this £85,000. To my mind he has not only not made that out, but I should say affirmatively that upon the evidence I am satisfied he knew he was not buying that, but that he knew what he was buying, and got what he thought he was buying.

Solicitors for plaintiffs: *Woodrooffe & Plaskitt.*

Solicitors for defendants: *Milne, Riddle & Mellor*, agents for H. C. Corfield, Oswestry.

See *Peek v. Gurney*, 8 Eng. Rep., 34 note.

Directors and trustees are liable to one who purchases the stock of their corporation in consequence of fraudulent prospectuses or other fraudulent representations as to the value of the stock: *Morgan v. Skiddy*, 62 N. Y., 319; *Rhodes v. Starnes*, 22 Lower Can. Jur., 118; *Smock v. Henderson*, 1 Wilson's Superior Ct. R., 242, 259-260; *Twycross v. Grant*, *ante*, 387.

See *Nelson v. Luling*, 62 N. Y., 645.

In an action against directors of a company for false and fraudulent representations contained in a prospectus issued with their knowledge, and the material statements in which were untrue in fact, but were made—as the prospectus stated—on the authority of vouchers which were mentioned and declared as “believed to be true,” but which turned out to be false and fraudulent.

Held, first, that it was for the jury whether the representation of the directors was that they believed the statements of the facts to be true, or that they believed the vouchers to be genuine:

Secondly, that in either view the question would be whether they honestly believed in the truth of the representation they made, and that if they had such honest belief they were not liable; but

Thirdly, that if they had no such honest belief, and the plaintiff took his shares and paid his money on the faith

of the prospectus, and not on his own judgment on the vouchers set forth, then that the defendants were liable: *Charlton v. Hay and others*, 32 Law Times Rep., N.S., 96.

It has been held that a shareholder cannot claim damages against directors for having been induced to purchase shares by misrepresentation, if he has continued to hold them without objection long after he had knowledge, or full means of knowledge, of the untruth of the representations on which he bought them: *Rhodes v. Starnes*, 22 Lower Canada Jurist, 118.

One who is guilty of fraudulent representations in the sale of stocks is liable therefor: *Smock v. Henderson*, 1 Wilson's Superior Ct. R., 242, 259-260, and cases cited.

If the owner of property, being a director, withhold from his co-directors, on a sale of a mine to the corporation, any material information as to facts affecting the mine, intending thereby that his co-directors should be misled, his conduct is actionable if it operated to induce the purchase: *Emma Silver Mining Co. v. Park*, 14 Blatchford, 441.

Where the owners of land conspired to sell lands owned by them to a company to be organized by them, and by fraudulently claiming to subscribe a certain sum, and by other devices induced the formation of the company and the purchase of their lands at a price far beyond their cost, they were held liable to those induced to subscribe

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and pay for stock of the corporation : *Getty v. Donnelly*, 9 Hun, 603, 54 N. Y., 403, 70 N. Y., 504.

If the purchaser be fully informed of the facts showing a prospectus or statement as to the value of stock is false, he cannot maintain an action: *Nelson v. Luling*, 62 N. Y., 645.

The mere fact that a trustee allows his name and credit to be used to float the stock of a corporation, which afterwards turns out to be worthless, in the absence of evidence of knowledge on his part, or that he has made or sanc-

tioned any false representations, does not constitute actionable fraud : *Morgan v. Skiddy*, 62 N. Y., 319.

In the absence of any false representations by which a purchaser is induced to buy shares of stock in an incorporated company, although the stock may have been depreciated in value before the purchase by the act of parties managing the business of the corporation, the purchaser cannot recover against such parties : *Smock v. Henderson*, 1 Wilson's Superior Ct. R. (Ind.), p. 242.

[4 Chancery Division, 718.]

C.A., Nov. 25 ; Dec. 19, 1876.

MASTER V. HANSARD.

[1876 M. 135.]

Restrictive Covenant—Covenant running with the Land—Easement—Disposition by Owner of two Tenements.

The owner of an estate granted a lease of a plot of ground to A., who covenanted that he, his executors, administrators, or assigns, would not during the term do on the premises anything which should be an annoyance to the neighborhood or to the lessor or his tenants, or diminish the value of the adjoining property, nor build, nor allow to be built, on the ground any building or erection without first submitting the plans to the lessor and obtaining his approval. The landlord some years afterwards granted a lease of an adjoining plot to B., who entered into a similar restrictive covenant. Within twenty years A. commenced, with the approval of the lessor, to build upon his ground so as to darken the windows of B.'s house.

On bill by B. to restrain A. from erecting and the lessor from approving the building objected to:

Held, that B. was not entitled to relief either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in A.'s lease enured for B.'s benefit.

By indenture dated the 1st of December, 1853, Hansard and Rogers demised to one Master a piece of ground at the Anerley Road, Penge, with a building upon it known as the Crystal Palace Hotel, for the term of ninety-nine years, from the 24th of June, 1852. The deed contained a covenant by Master that he, his executors, administrators, or assigns, would not during the term do anything upon the premises which might be an annoyance to the neighborhood or to the lessees or tenants of the lessors, their heirs or assigns, or diminish the value of the adjacent property, nor should *nor would erect or build, or cause or [719] permit to be erected or built, upon the said piece or parcel of ground thereby demised any dwelling house, outbuilding, coach house, stable, or other building nearer than

twenty feet to the Anerley Road, and also should not nor would during the term erect or cause or permit to be erected upon the demised ground any other messuage, building, or erection whatsoever without first submitting the plans thereof to the lessors, their heirs and assigns, and obtaining their approval of the same.

On the 14th of May, 1858, Hansard and Rogers demised to Hantler an adjoining piece of ground with two houses thereon, for ninety-four years, from the 24th of June, 1857. This lease contained a negative covenant on the part of the lessee identical in its terms with the above negative covenant contained in the lease to Master. It did not appear that Hantler when he took this lease knew anything of the terms of the lease to Master.

After divers mesne assignments, the leasehold interest created by the lease to Master was, by indenture dated the 12th of October, 1875, assigned to the Crystal Palace Hotel Company. The leasehold interest created by the lease of 1858 had in the meantime become vested in the plaintiff, Miss Master.

In 1876 the Crystal Palace Hotel Company determined to enlarge the hotel by adding a new wing, and on the 10th of March, 1876, wrote to the lessors asking their permission to extend the hotel as shown by the plan. It was not in dispute that the additional building was one the erection of which could have been restrained as unduly interfering with the plaintiff's lights had they been ancient lights. The plaintiff complained to the lessors, who stated that the buildings would be proceeded with. The plaintiff thereupon commenced her action against the lessors and the Crystal Palace Hotel Company, claiming that the lessors might be restrained from giving their approval to the plans, or their consent to the erection of any buildings which would interfere with the access of light to the plaintiff's house; that the defendants might be restrained from erecting or permitting to continue erected on the lands of which the company were the tenants the building then in course of erection or any other buildings which would interfere with the access of light to the plaintiff's house, or diminish the value of the house, and for damages and further relief.

720] *Vice-Chancellor Bacon held that the plaintiff could not claim to have the restrictive covenant enforced in her favor, but directed an inquiry as to damages. The Crystal Palace Hotel Company appealed. The appeal was heard on the 25th of November, 1876.

Kay, Q.C., and *Romer*, for the appellants, having read

the judgment of the Vice-Chancellor, were stopped by the court.

Hemming, Q.C., and *Methold*, for the plaintiff: We contend that this case comes within the principle as to dispositions by the owner of two tenements. If our lessors had remained owners of the hotel property, they could not have built in this way, for it would have been in derogation of their grant. The principle which we contend for is, that if the grantor has such an interest in the adjoining property that he can protect the easements which would have been enjoyed if that adjoining property had belonged absolutely to him, he is bound to protect them.

[JAMES, L.J., referred to *Booth v. Alcock* (*).]

The reason of the rule applies equally whether the grantor has an estate in the adjoining land or a right over it which enables him to secure an easement of light over it.

[BRAMWELL, J.A.: Suppose the grant to the company had been in fee, would the covenant have run with the land?]

We submit that, if entered into for the benefit of our property, it would. At all events, there would be a right of suit in equity. But we need not go so high as that. All we need urge is, that necessary easements pass where the grantor has power to secure the enjoyment of them. The principles as to the grant by the owner of two tenements are shown in *Swansborough v. Coventry* (*) and *Booth v. Alcock*, and extend to all cases where the grantor at the time of the grant has such right or ownership over the adjoining land as enables him to secure the lights of the land granted against obstruction.

[JAMES, L.J., referred to *Eastwood v. Lever* (*).]

An implied grant gives all necessary easements, an express *grant, all convenient easements. Then, again, [721 in the hotel lease there is a covenant not to do anything which will lessen the value of the adjoining property. This is a covenant introduced for the benefit of the adjoining property, and there is authority to show that it enures for the benefit of all subsequent takers of that property: *Western v. MacDermott* (*); *Keates v. Lyon* (*). In *Child v. Douglas* (*) the Vice-Chancellor went too far as regards the *dictum* which intimates that every covenant restrictive of building must have been inserted for the benefit of the adjoining land. In *Keates v. Lyon* this was negatived; but that case is not against a covenant plainly intended for the

(*) Law Rep., 8 Ch., 668.

(*) 9 Bing., 805.

(*) 4 D. J. & S., 114.

(*) Law Rep., 2 Ch., 72.

(*) Law Rep., 4 Ch., 218.

(*) Kay, 560.

benefit of the adjoining land enuring to the benefit of subsequent grantees of that land, and this is clearly such a covenant.

JAMES, L.J.: I am of opinion that this decree cannot be sustained. The defendants, the Crystal Palace Hotel Company, are owners of a property under a demise for a term of years, and are erecting on it a building which may lawfully be erected unless they have put themselves under an obligation not to do so. The plaintiff is the owner of an adjoining property under another demise for a term of years from the same lessors, of later date than that of the defendants; he therefore cannot have acquired any right against them, except under some grant which could lawfully be made. Now, the lessors could not grant anything so as to derogate from the rights of their prior grantee. The respondent, therefore, was obliged to rest his case on the covenants entered into by the defendants' predecessor in title with the grantor, and the question is whether those covenants bring the case within the rule which says that the owner of two tenements who grants one of them cannot derogate from his own grant by anything he does on the property which he reserves, the property granted becoming entitled to easements known as easements derived by the disposition of the owner of two tenements. The plaintiff contends that though the grantor when he made the grant under which the plaintiff claims had ceased to be the owner of the defendants' tenement, 722] he had a right which *he could have used in such a way as to prevent the plaintiff's enjoyment of his property being interfered with in any way in which the grantor would not have been allowed to interfere with it if he had retained the defendants' property, and that this interest brings the case within the rule as to the owner of two tenements. It would be a novel extension of that doctrine to hold that not only a grantor cannot do anything to derogate from his own grant, but that he is obliged to take active steps to prevent other persons from doing what he might not himself do. It cannot, in my opinion, be said that a right under a covenant is properly within the meaning of this rule. Then the plaintiff says: "You, my lessor, could, under the covenants entered into with you by your other lessee, have prevented this erection; you had and have that right; you have granted me a piece of ground with a house on it, and you ought to enforce those covenants for my benefit." Now, when the plaintiff took his lease he had no knowledge of the nature of the title to the adjoining property; all he knew was that the piece of property adjoining his had once been part of the

same estate; he knew nothing of the covenant; the grant to him contains no notice of it, and it would be strange to say that a man who has taken a covenant for his own benefit can be prevented from dealing with it for his own benefit because he has granted parcels of the land to other people. The covenant is not mentioned in the plaintiff's lease, and it cannot have been the intention of the parties thus to restrict the use of a covenant which was entered into, not for the benefit of the adjoining land, but for the benefit of the owner of the estate, that he might be able to make the most of it. It would be too great an extension of the doctrine of implied obligation to raise by implication a right in the nature of an equitable assignment of the benefit of the covenant. There was no bargain as to enforcing the covenant for the benefit of the plaintiff, and we cannot imply one.

BAGGALLAY, J.A.: When this case was before the Vice-Chancellor it was insisted that there was a right to relief against Hansard and Rogers on the ground that they could not derogate from their own grant; that they could not derogate from it by building or by allowing *building [723 which they had a right to prevent; and that the plaintiff was entitled to the benefit of the restrictive covenants, to the benefit of which Hansard and Rogers were entitled as against the hotel company. The Vice-Chancellor disposed of these points in favor of the defendants, on the authority of *Keates v. Lyon* (¹), and I shall not consider them further, as they have been dealt with by the Lord Justice James; but he directed an inquiry on the ground that if the light coming to the plaintiff's windows was interfered with that gave him a right to relief. I am unable to follow this, and am of opinion that the decree must be reversed, and the bill dismissed.

BRAMWELL, J.A.: I am also of opinion that this appeal must be allowed. It is clear to my mind that the doctrine as to disposition by the owner of two tenements does not apply. Hansard and Rogers at the time of the grant to the plaintiff's predecessors in title were not owners of the land on which the Crystal Palace Hotel is built in the sense of being able to make a grant of an easement over it, and there is therefore no reason why the law should imply a grant of one. In this case it is not complained that Hansard and Rogers are derogating from their grant by anything that they are doing. The complaint is that they do not act affirmatively to prevent other persons from doing certain acts. I am of opinion that we cannot extend the rule in this

(¹) Law Rep., 4 Ch., 218.

way. To take an extreme case, suppose the first grantees had covenanted to erect no buildings, and then trespassers had come in and built; could the plaintiff have called on the landlord to take steps to turn them out? So if the lessees had erected buildings I take it that the plaintiff, in the absence of any covenant by his landlords to that effect, could not call on the landlords to enforce against the lessees their covenant not to build. It did indeed occur to me during the argument that if it could be shown that the covenants entered into by the lessees of the Crystal Palace Hotel property were meant for the benefit of the owners of the adjoining property, and had been made known to the plaintiff's assignor when he took his lease, or possibly even if 724] they had not been so made known, it might have *been said that the lessee of the second property was an equitable assignee of the benefit of those covenants. But when I look at the facts of this case I am satisfied that the restrictive covenant was not put in for the benefit of this particular property, but for the benefit of the lessors, to enable them to make the most of the property which they retained, and it seems to me that they have not precluded themselves from allowing these buildings to be erected. It appears monstrous to hold that this covenant, the existence of which was never communicated to the plaintiff's predecessors in title when they took their lease is to be construed as enuring for their benefit. Such a construction would to some extent be derogating from the grant to the Crystal Palace Company. If a stipulation had been made with the plaintiff to enforce the covenant in his favor, the first lessees might say, "You are not treating us fairly, we believed that you would enforce this covenant for the general benefit of your property, not in this partial way." I need not, however, go into that, as I hold that the plaintiff is not the equitable assignee of this covenant, which is general, and not confined to the plaintiff's property.

Solicitors: *Johnson & Master ; C. C. Ellis & Co.*

[2 Chancery Division, 724.]

C. J. B., Nov. 13, 1876: C. A., Dec. 21, 1876.

In re NEWMAN. Ex parte CAPPER.

Proof—Building Contract—Failure to complete in Time—Penalty—Liquidated Damages—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 23, 31—8 & 9 Will. 3, c. 11, s. 8.

A contract for the erection of buildings provided that they should be completed by the 25th of December, and that in default thereof the contractors should forfeit

to the employer £10 per week for every week after that date during which the buildings should remain unfinished; also that, if the contractors were prevented by bankruptcy or any other cause from completing, the employer might rescind, and that the moneys then already paid should be considered the full value of the works executed. There were various other stipulations, and a final provision that, in case the contract should not be in all things duly performed by the contractors, they should pay to the employer £1,000 as and for liquidated damages.

Before the 25th of December the contractors filed a liquidation petition. Their trustees carried on the works for a time, and then abandoned the *contract. [725 Another builder was employed to complete the works, which were not finished till long after the 25th of December:

Held, that the £1,000 was in the nature of a penalty, and that the employer was entitled to prove in the liquidation only for the actual damage he had sustained by the delay in the completion of the works.

Decision of Bacon, C.J., reversed.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 20th of April, 1875, articles of agreement were entered into between Henry Newman and Samuel Newman, who were builders at Winchester, carrying on business in partnership under the firm of H. Newman & Son, of the one part, and the governors of the Odiham Endowed School, of the other part, by which Newman & Son agreed with the governors to erect certain school buildings and a residence for a master, according to the specifications and the plans and drawings therein referred to, "the said works to be finished, completed, and delivered up, cleared of all scaffolding, rubbish, and other impediments, on or before the 25th of December, 1875, and, in default thereof, the said contractors shall forfeit and pay to the said governors the sum of £10 per week, for every week after that date during which the said works shall remain unfinished and not delivered up." There was a further provision that, in case any of the materials used, prepared, or intended to be used by the contractors should be considered by the governors' surveyor unsound or improper, the contractors would upon notice in writing remove them, and, in default of their doing so within three days after notice, it should be lawful for the surveyor to remove them at the expense and risk of the contractors, and all expenses thereby occasioned should either be deducted out of any moneys then or thereafter due to them from the governors, or should be recoverable by them of the contractors as liquidated damages. There were similar provisions in case the surveyor should be dissatisfied with any master foreman, or workman employed by the contractors, and in case the surveyor should consider any part of the work unsound or improperly executed. And the governors agreed to pay to the contractors as the price of the works the sum of £3,290, by instalments, at the

in addition to the £10? *Magee v. Lavell* (¹) is distinctly in our favor. There Lord Coleridge, C.J., after referring to *Reilly v. Jones* (²) and *Kemble v. Farren* (³): "The general principle of law appears to be, that where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty."

De Gea, in reply: In *Magee v. Lavell* there was a stipulation for the payment of a small amount of rates and taxes which were in arrear; therefore the principle of *Kemble v. Farren* (⁴) applied. In the present case, if the respondents are right, the final clause in the contract has no meaning.

BACON, C.J.: The provisions of this contract are so plain that, however it may have been in other cases which have been mentioned, it would be very difficult to give any other meaning to them than that which they bear on their face. Of course it is necessary carefully to construe penal clauses in instruments of various kinds. But I do not see what similarity there is between the present case and that of *Kemble v. Farren*, because in that case the real contract was that where a payment of money was to be made periodically a default in paying that money should not be considered as the forfeiture of a penal sum. But what resemblance has that case to the present? The present case is this: The school governors, *for the benefit of the school, agreed to employ the debtors on certain terms, and I must say that their plain object was that the buildings should be completed by the 25th of December. That was the contract between the parties, that they should have the schools fit to use by that time. The contract contains a variety of stipulations, not at all unusual in such an instrument, and at the end of it there is that one upon which this discussion has arisen, that, in case of default being made in the performance of any of these stipulations, the debtors should pay to the governors £1,000 as and for liquidated damages. How am I to know that the governors would ever have entered into the contract but for that clause? It was agreed that the debtors should build the schools in the way prescribed, and the very essence of the contract was, "You shall give us the schools by the 25th of December, and if you do not you shall pay to us the sum of £1,000;" and the contractors say, "very well." The contention on the part of the respondents is that there was no

(¹) Law Rep., 9 C. P., 107.

(²) 1 Bing., 302.

(³) Law Rep., 9 C. P., 111.

(⁴) 6 Bing., 141.

contract for the payment of any particular sum of money, and that clause is referred to which provides that, if the schools shall not be completed by the 25th of December, the contractors shall pay a penalty of £10 per week from that time until the schools shall be completed. It is impossible now to ascertain that sum at all. The schools never can be completed within the time specified in the contract. They were not completed then, and now they never can be completed within the time. The trustees repudiated the contract, and under what circumstances? The liquidation commenced early in November. There may have been time enough between then and the 25th of December (I do not know whether there was, but the trustees seemed to think that there was) to complete the buildings, and at first they went on with the contract for that purpose, and they actually received a sum of money as payment towards the completion of the contract, but, as soon as it seemed to them likely to be an unprofitable contract, they made up their minds that they would have nothing further to do with it, and they threw it up.

What resemblance is there between this case and *Kemble v. Farren* (¹), or any of the other cases cited?

*Here it was of the substance, the very essence, of [730 the contract, that the buildings should be completed by the 25th of December. In November the trustees had the option of saying that they would or would not complete the contract, and they went on with it up to a certain time, when they repudiated it. The meaning of the clause, if it means anything at all, is, that the penalty of £1,000 has been incurred. I cannot alter the contract; I cannot find any circumstances to induce me to say, or to justify me in saying, that in the events which have happened a less sum than £1,000 should be paid. If I were to say that, I should be obliged to ask myself how much less than £1,000 ought to be paid? What means have I of ascertaining that? It has not been suggested that there are any particulars of the amount of damage which has been incurred, and I do not know that anybody is in a position to furnish them. But I say that if the contention of the trustees were right, I should be puzzled greatly in either finding, or directing any other tribunal to find, the amount of the specific damage which has been sustained. The order is wrong, and the appeal must succeed. The appellants must have their costs of the hearing in the court below and of the appeal.

(¹) 6 Bing., 141.

From this decision the trustees appealed. The appeal was heard on the 21st of December, 1876.

Bagshawe, Q.C., and *F. O. Crump*, for the appellants: We contend that the £1,000 is only intended as a pealty. *Kemble v. Farren* (¹) clearly applies. The governors are only entitled to prove for the actual damage they can show that they have suffered. *Betts v. Burch* (²) shows that *Galsworthy v. Strutt* (³) and *Atkins v. Kinnier* (⁴) which are relied on against us, are not binding authorities. And the latest case on the subject, *Magee v. Lavell* (⁵), is in our favor.

De Gex, Q.C., and *G. W. Lawrance*, for the governors: It would be impossible to ascertain the amount of damages caused to the governors by the school not having been 731] opened at the time appointed. Pupils who would have come to this school may have gone to other schools. The £1,000 was mentioned in order to meet this uncertainty, and the parties must be taken to have fixed the amount of damages themselves. The case is totally different from *Kemble v. Farren* (¹). *Galsworthy v. Strutt* (³) and *Atkins v. Kinnier* (⁴) were cases in the decision of which the late Lord Wensleydale took part. *Green v. Price* (⁶) is another authority in our favor. *Magee v. Lavell* (⁵) does not apply. Here certain damages are fixed for particular breaches of the contract, and the £1,000 provides for all other breaches such as the one which has actually occurred, the damage resulting from which it would be impossible to ascertain.

JAMES, L.J.: I am of opinion that this case is clearly within those which have been referred to by Mr. Bagshawe. The authority of *Kemble v. Farren* cannot be considered as having been in any degree nibbled away by those cases before Lord Wensleydale which have been referred to, and which it is said show that the principle of *Kemble v. Farren* is to be confined to a case in which, amongst other stipulations, there was one stipulation for the payment of a sum of money. That was not the *ratio decidendi* of *Kemble v. Farren*, in which it was laid down in broad terms that, wherever there is a sum mentioned at the end of a contract as damages for the non-performance of any of a great number of stipulations, there it must be treated as a penalty. The law is, I think, stated in a very satisfactory way in a case which was referred to in the argument of *Kemble v.*

(¹) 6 Bing., 141.

(²) 4 H. & N., 506.

(³) 1 Ex., 659.

(⁴) 4 Ex., 776.

(⁵) Law Rep., 9 C. P., 107.

(⁶) 13 M. & W., 695.

Farren, I mean *Astley v. Weldon* ⁽¹⁾, in which Mr. Justice Heath said: "Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." And Mr. Justice Chambre gave this instance: "There is one case in which the sum agreed for must always be considered as a penalty; [732 and that is, where the payment of a smaller sum is secured by a larger. In this case it is impossible to garble the covenants, and to hold that in one case the plaintiff shall recover only for the damages sustained, and in another that he shall recover the penalty; the concluding clause applies equally to all the covenants." And Lord Eldon said ⁽²⁾: "There are many instances of the defendant's misconduct which are made the subject of specific fines by the laws of the theatre. Are we, then, to hold that, if the defendant happens to offend in a case which has been so provided for by those laws, she shall pay only 2s. 6d. or 5s., but if she offend in a case which has not been so provided for, she shall pay £200?" These observations appear to me to apply exactly to the case before us with regard to the argument which Mr. De Gex and Mr. Lawrance have pressed upon us, that there are in this agreement provisions in the nature of liquidated damages for specific things, that is to say, for such and such a breach you shall pay the extra expense occasioned, and for such and such another breach you shall pay the actual costs occasioned, and for another breach you shall pay £10 per week. Those, however, are all covered by the general clause at the end. Is it to be held that, if the defendant happens to offend in any one case which has been provided for by those special stipulations, then he shall pay only the actual damages thereby occasioned, but, if he offends in any one case which has not been so provided for, he shall pay £1,000? It is exactly within the very words of Lord Eldon. The fact that there are those special provisions made for special cases, and then that there is at the end a lump sum of £1,000 mentioned for any breach of the contract, which of course includes all those breaches which are specially provided for, so that if the words are construed literally, the contractor would, in the event of his committing one of those particular breaches, have to pay not only the actual damages, but also the £1,000, shows

⁽¹⁾ 2 B. & P., 346, 353.⁽²⁾ 2 B. & P., 352.

what a strong case it is for the application of the doctrine which was laid down in *Kemble v. Farren* ⁽¹⁾.

I am of opinion that the order of the Chief Judge cannot be sustained.

733] *BAGGALLAY, J.A.: I am of the same opinion. I will only add that the principle upon which *Kemble v. Farren* ⁽¹⁾ was decided was commented upon by Lord Westbury in the case of *Thompson v. Hudson* ⁽²⁾ in these terms: "If the sum described as liquidated damages be a large sum, and the title to that sum is to arise upon some very trifling consideration, then it follows plainly that the large sum named never could have been meant to be the real measure of damages. It was an oppressive agreement; the sum named never could have been the proper amount of damages arising upon the non-observance of some of the stipulations of that agreement, which probably would have been measured by a few shillings, and therefore the very large sum stated to be damages was properly regarded as in the nature of a penalty." If further authority was wanted for the decision at which we have arrived in this case, I think it is found in the words used by Lord Coleridge in *Magee v. Lavell* ⁽³⁾, which appear exactly applicable to the present case.

BRAMWELL, J.A.: I am entirely of the same opinion. I do not wish to quote anything I have said as an authority, and I do not wish to repeat it. Therefore, instead of repeating it, I will simply say that I abide by everything I said in *Betts v. Burch* ⁽⁴⁾.

It has been argued that in *Galsworthy v. Strutt* ⁽⁵⁾, and the other cases referred to by Mr. De Gex, we have the authority of Lord Wensleydale that this £1,000 can be proved against the debtors' estate. If it were a question of bare authority, independently of principle, I should say that we have the rule laid down by Lord Coleridge in *Magee v. Lavell* expressly to the contrary, where he says ⁽⁶⁾: "If we look to the nature of the contract in the present case, it will be seen that it involves several events of various degrees of importance, and, therefore, according to the general principle governing such cases, the sum mentioned must be considered as a penalty and not liquidated damages." Therefore, if we had to choose between the opinions of Lord Wensley-
734] dale and *Lord Coleridge, the latter is, in my view, the law, and is consistent with the reason and principle of

⁽¹⁾ 6 Bing., 141.

⁽²⁾ Law Rep., 4 H. L., 1, 80.

⁽³⁾ Law Rep., 9 C. P., 107.

⁽⁴⁾ 4 H. & N., 506.

⁽⁵⁾ 1 Ex., 659.

⁽⁶⁾ Law Rep., 9 C. P., 115.

the thing, which I think depends upon the statute 8 & 9 Will. 3, c. 11, s. 8. I do not know that it is necessary for us to say that the decision in *Galsworthy v. Strutt* (*) was erroneous. It is certainly a most singular thing that never once in the course of his judgment does Lord Wensleydale refer to the statute of Will. 3. It seems to me, as I said in *Betts v. Burch* (*), that by some good fortune the courts have in the majority of cases gone right without knowing why they did so. I cannot help thinking that what Lord Wensleydale did in *Galsworthy v. Strutt* was to look upon the covenant as an agreement not to do one thing, namely, that the covenantor or obligor would not carry on the business of an attorney, and that the clause that he would not solicit the clients of his late copartnership was ancillary to what might be called the substance of the covenant he had entered into, or an explanation or enlargement of it. That may be the thing which operated on Lord Wensleydale's mind, though I confess he does not give expression to it.

I am of opinion that this appeal must be allowed. I may add that I cannot think there can be any difficulty in assessing the damages.

JAMES, L.J.: The appellants will have their costs before the Chief Judge, as well as the costs of this appeal.

Solicitors for appellants: *Pickett & Mylton*, agents for Bailey & White, Winchester.

Solicitors for governors: *Lambert, Petch & Shakespear*, agents for C. & F. I. Warner, Winchester.

(*) 1 Ex., 659.

(*) 4 H. & N., 506.

See 8 Eng. Rep., 481 note.

"The question whether a sum named in a contract, to be paid for a failure to perform, shall be regarded as stipulated damages, or a penalty has been frequently before the courts, and has given them much trouble. The cases cannot all be harmonized, and they furnish conspicuous examples of judicial efforts to make for parties wiser and more prudent contracts than they had made for themselves. Courts of law have, in some cases, assumed the functions of courts of equity, and have relieved parties by forced and unnatural constructions from stipulations highly penal. Where an amount, stipulated as liquidated damages, would be grossly in excess of the actual damages, they have leaned to hold it a penalty. Where the actual damages were uncertain and difficult of ascertainment,

they have leaned to hold the stipulated amount to have been intended as liquidated damages. No form of words has been regarded as controlling. But the fundamental rule, as often announced, is that the construction of these stipulations depends, in each case upon the intent of the parties, as evinced by the entire agreement construed in the light of the circumstances under which it was made": *Kemp v. Knickerbocker Ice Co.*, 69 N. Y., 57-8, and cases cited; *Lampman v. Cochran*, 16 N. Y., 275; *Clement v. Cash*, 21 N. Y., 253; 12 Am. Law Review, 286-300; *Bishop on Contracts*, §§ 753-755.

See *Noyes v. Phillips*, 60 N. Y., 408, 412, and cases cited; *Sparrow v. Paris*, 7 Hurl. & Norm., 594; *Shute v. Taylor*, 5 Met., 61; *Lynde v. Thompson*, 2 Allen, 456; *Ward v. Jewett*, 4 Rob.,

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719-720; Holbrook v. Tobey, 66 Maine, 410; Hoagland v. Segur, 88 N. J. Law, 230; Whitfield v. Levy, 35 N. J. Law, 235; Yenner v. Hammond, 86 Wisc., 277; Scott v. Dent, 88 U. C. Q. B., 30; Fisher v. Berry, 16 U. Com. Pl., 23.

As to whether, where a contract contains an agreement of the parties to do certain acts, or to forfeit a specified sum, the sum named is to be deemed a penalty or liquidated damages, quære? Noyes v. Phillips, 60 N. Y., 408.

The word "forfeit" is not conclusive upon the question, but is to be determined by the intent of the parties, as evinced by the contract and the surrounding circumstances: Noyes v. Phillips, 60 N. Y., 408.

Where a contract contains a penalty,

a party suing for a breach of the contract is not limited in the amount of damages to the penalty: Noyes v. Phillips, 60 N. Y., 408; Ayres v. Pease, 12 Wend., 393; Gobble v. Linder, 76 Ills., 157; Newlin v. Pyne, 40 Iowa, 166; Hoagland v. Segur, 88 N. J. Law, 230; Stewart v. Bedell, 79 Penn. St., 336; Grand, etc., v. Phillips, 23 Wallace, 472; Yenner v. Hammond, 86 Wisc., 277; Fiskien v. Wride, 7 Grant U. C. Chy., 598.

When the sum per day is fixed as the liquidated damages for failure to complete a building at a particular time, that may be recovered: Fisher v. Berry, 16 U. C. Com. Pl., 23; Scott v. Dent, 88 U. C. Q. B., 30.

[4 Chancery Division, 735.]

M.R., August 4, 1876: C.A., Jan. 12, 1877.

735] *ATTORNEY-GENERAL V. GREAT WESTERN RAILWAY COMPANY.

[1876 A. 119.]

Railways Regulation Act (5 & 6 Vict. c. 55, s. 6)—Opening of Railway—Inspector's Report—Jurisdiction—Board of Trade.

Where an inspector of the Board of Trade reports to the Board of Trade that the opening of a railway will be attended with danger to the public by reason of the incompleteness of the works, and gives the grounds of his opinion, the requisitions of the 5 & 6 Vict. c. 55, s. 6, are satisfied—the Board of Trade has exclusive jurisdiction in the matter—and the court will not enter into the question whether the reasons given by the inspector do not show on the face of the report that he has come to a wrong conclusion.

[4 Chancery Division, 749.]

C.A., March 6, 1877.

749]

*HARRIS V. AARON.

[1875 H. 205.]

Practice—Appeal for Costs—Right to open the whole Decree—Judicature Act, 1873, s. 49—Rules of Court, 1875, Order LVIII, r. 6.

A bill was dismissed by a Vice-Chancellor without costs. The plaintiff appealed against the whole decree, and his appeal was dismissed:

Held, that the court had no power to vary the order of the Vice-Chancellor by directing that the bill should be dismissed with costs.

THE bill in this case was filed by an execution creditor for the purpose of getting the benefit of an elegit upon the equity of redemption of his debtor's land.

Vice-Chancellor Bacon dismissed the bill, but without costs. The plaintiff appealed from the whole decree.

Kay, Q.C., *Laxton*, and *Cooper Willis*, for the appellant.

Hemming, Q.C. (*Cottrell* with him), for the defendant, asked that, in the event of the court holding that the Vice-Chancellor was right in dismissing the bill, the decree might be varied by dismissing the bill with costs. The defendant had not given notice of his intention to apply for this variation, but it was not absolutely necessary to do so, as the whole decree was open, and the court had full power to do justice under Rules of Court, 1875, Order LVIII, rule 6.

JAMES, L.J., said that the court had no power to alter the direction of the Vice-Chancellor as to costs, which were entirely within his discretion. The 49th section of the Judicature Act, 1873, was imperative.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

THE COURT held, on the merits, that the Vice-Chancellor was right in dismissing the bill; and accordingly dismissed the appeal with costs.

Solicitors: *J Croft*; *T. W. Payne*.

[4 Chancery Division, 750.]

C.A., Jan 12, 13, 1877.

*WARNER V. MURDOCH.

[750

[1876 W. 133.]

MURDOCH V. WARNER.

[1876 M. 189.]

Trial by Jury—*Trial before a Judge of Chancery Division*—*Judicature Act*, 1873, ss. 29, 30, 37—*Rules of Court*, 1875, Order xxxvi, rr. 1, 4, 8, 16, 29, 29a; Order xxxix; Order xli, rr. 1, 5.

A trial by jury cannot be heard before a judge of the Chancery Division. Actions commenced in the Chancery Division, if they are to be tried by a jury, must be set down in the general list, to be tried by one of the judges of the Common Law Divisions.

Clarke v. Cookson (1) approved.

THE first of the above-mentioned actions was brought by the trustees of the United Kingdom Temperance and General Provident Institution to set aside a policy of assurance on the life of John Turner, deceased, on the ground of misrepresentation in the policy. The second action was brought by the defendants in the first action, who were the personal representatives of John Turner, against the trustees of the company, for the recovery of the sum secured by the policy.

On the 16th of November, 1876, on the application of the

(1) 2 Ch. D., 746.

plaintiffs in the first action, the Master of the Rolls made an order consolidating the two actions, and giving the control of the proceedings to the plaintiffs in the first action; and at the request of the defendants in the first action he also ordered that the action should be tried before a special jury, but that the trial should not take place without further order.

On the 11th of December, 1876, by arrangement between the parties, an application was made by the plaintiffs for a direction to the Registrar to set down the action to be tried before the Master of the Rolls with a jury, whereupon his Lordship, without hearing any argument or expressing any opinion of his own, said that he thought it right to follow 751] the decision of Vice-Chancellor *Hall in *Clarke v. Cookson* (¹), that trials with a jury could not be heard before a judge of the Chancery Division.

From this decision the plaintiffs appealed.

Chitty, Q.C., and *Kekewich*, for the appellants: Consider how the practice stood as to trials by jury before the Judicature Act. Lord Cairns' Act (21 & 22 Vict. c. 27) gave the Court of Chancery power to have cases tried by a jury before the court itself, and the operation of this enactment was extended by Sir J. Rolt's Act (25 & 26 Vict. c. 42). The Judicature Act, 1873 (36 & 37 Vict. c. 66), did not repeal either of these acts, but gave the high court all the powers which the several courts had before it passed. By sect. 23 the jurisdiction thus conferred on the high court is, in the absence of any special provision in the act or orders, to be exercised, so far as regards procedure and practice, in as nearly as may be the same manner as it might have been exercised by the courts from which it was transferred. To the same effect is sect. 21 of the Judicature Act, 1875. Now, there is nothing in the act or rules to prevent this jurisdiction being exercised in the same way as before. The 29th and 30th sections of the Judicature Act, 1873, are not sufficient for this purpose. *Canot v. Morgan* (²) contains a clear expression of opinion by the Lord Chancellor that a case may be tried by jury before the Court of Chancery. The Master of the Rolls gave no opinion of his own, but followed the only reported case on the subject, *Clarke v. Cookson*. The Vice-Chancellor there refers to several sections of the act which, it is submitted, do not justify his conclusion. Sect. 29 is an enabling clause, and does not appear to exclude trials by a jury elsewhere. Sect. 30 prescribes that sittings for trial by jury are to be held in London and Middlesex. The judges of the Court of Chancery sit in Middlesex, and their

(¹) 2 Ch. D., 746.

(²) 1 Ch. D., 1.

sittings are sittings in Middlesex, and they are so called in Order LXI, rule 1. If sittings in Lincoln's Inn are not to be considered sittings in Middlesex, then the judges who sit at Lincoln's Inn during the Long Vacation under Order LXI, rule 5, have no jurisdiction. Then, as to sect. 37, we contend that it only means that there are to be certain sittings at certain places for trials by jury only, and *that it [752 does not say that an action shall not be tried before a jury elsewhere. Order xxxvi, rules 1, 8, 16, have been referred to as opposed to our view, but the only thing against us in these rules is that they do not expressly refer to trials by jury before the court in the Chancery Division. If a suit had commenced in Chancery before the Judicature Acts came into operation, it would be a hard thing to deprive the suitor of his right, under Lord Cairns' Act, to a trial by jury. It is observable that, although by Order xxxix, rule 1, the mode of procedure in moving for a new trial, either before a jury or a judge without a jury, in the Queen's Bench, Common Pleas, and Exchequer Divisions, is provided for, there is no regulation as to motions for new trials in the Chancery Division. The reason for this is that the Legislature intended to leave the old practice in the Court of Chancery as to new trials, which are regulated by the Consolidated Orders xli, rule 46, untouched. This is an indication that it was not intended to interfere with general procedure as to trials by jury in the Court of Chancery.

H. M. Sladen, for the defendants, referred to rule 29*a* (December, 1876) of Order xxxvi.

JAMES, L.J.: I am of opinion that the order of the Master of the Rolls cannot be disturbed. There is really no question of jurisdiction here. Whatever jurisdiction the Court of Chancery formerly had has now been transferred to the High Court of Justice. The only question is as to the mode of procedure, and no one has a vested right in any particular form of procedure. Formerly the suitor in chancery had a right to a trial before a judge of the Court of Chancery with a jury, and it is said that he must still have that right. But a man has no vested right to have his cause tried before a judge of the Chancery Division any more than he had formerly a vested right to have it heard by a particular judge of the Court of Chancery, or a vested right to prevent its being transferred from one judge to another. Certain modes are prescribed by the judicature Acts for trials of actions. A man may now bring in the Chancery Division almost any variety of action *which might have been brought in the common law [753

courts. Then the pleadings proceed until the action is ready for trial, and it is wholly immaterial to the suitor whether it is set down for trial before one judge or another. The 1st rule of Order xxxvi says that where no place of trial is named in the statement of claim, the place of trial shall, unless a judge otherwise order, be the county of Middlesex. It appears to me that exactly the same course is to be pursued in whatever Division the action may be. If it is a country case, it will be tried at the assizes; if a London case, at the sittings in London; if in Middlesex, or if no place be mentioned, then in Middlesex. All the actions for trial will be set down in the general list, without regard to the division in which they are commenced, and each action will be tried by the particular judge on whom that duty devolves of trying actions on the particular day on which the action comes on in its turn for trial. Whether it was begun in the chancery or any other division, it follows the same course. That appears to me the plain meaning of the act and of the rules. The whole fallacy of the appellant's argument consists in supposing that a suitor in chancery has a right which no other suitor has to have his case tried in a particular mode. The appeal must be dismissed.

BAGGALLAY, J.A.: I am of the same opinion. The Master of the Rolls has decided that this is a proper case to be tried by a jury: it is for us to say whether, on the construction of the act and the rules, it should be tried before the Master of the Rolls, or should go in the general list of actions for trial in Middlesex. I think that if the words of the acts are attentively considered it is clear that the intention of the Legislature in framing the Judicature Acts of 1873 and 1875, was, that all actions not marked for trial in the country or in London should go into the general list, and be tried in Middlesex. The 16th section of the act of 1873 transfers the jurisdiction of the Court of Chancery and the other courts to the High Court of Justice. Then the 22d section provides that none of the jurisdiction so transferred shall be exercised except by the High Court of Justice, as provided by the act; and the 23d section enacts that the [754] jurisdiction, when transferred, shall be *exercised in the manner provided by the act, or by the rules to be made, and where no special provision is made by the act or the rules, according to the old practice in the courts from which the jurisdiction had been transferred. The act then goes on, in the 29th and 30th sections, to provide for the trials of actions generally—for those in the country at the assizes, and for other actions in London and Middlesex. These sections

are perfectly general, and apply to all trials by jury; there is no distinction made between actions in chancery and in the common law divisions, inasmuch as in the sections of the act previous to the 30th no division had been made of the High Court of Justice. But in the following sections it is provided that the High Court of Justice shall be divided into several divisions, and special duties are assigned to particular divisions. In the 37th section it is provided that, subject to any arrangements which may from time to time be made by mutual agreement between the judges, the sittings for trials by jury in London and Middlesex, and the sittings under commissions of assize, oyer and terminer, and gaol delivery, shall be held by the judges of the Queen's Bench, Common Pleas, and Exchequer Divisions. That must apply to all trials by jury under the 29th and 30th sections, and it makes no distinction between actions commenced in the chancery and any other division. It appears to me that this is carried out by the 1st rule of Order xxxvi, which provides that if a plaintiff proposes to have the action tried elsewhere than in Middlesex, he must name the place in his statement of claim; that is perfectly general, and applies to all actions. Then the 8th rule provides that the notice of trial shall state whether it is for the trial of the action or of issues therein, and in actions in the Queen's Bench, Common Pleas, and Exchequer Divisions, the place and day for which it is to be entered for trial. Why is this provision for an additional notice in those particular courts inserted unless the earlier part of the rule applies to all the courts? Then the 16th rule says that the lists of actions in London and Middlesex shall be prepared without reference to the divisions to which they were attached. It appears, therefore, to me clear, upon the construction of the act and of the rules to which I have referred, and with which the others are quite consistent, that the intention was that a trial by *jury should be held before a judge of one of [755 the common law divisions, from whatever division the action might come, either at the assizes or in London or Middlesex. It was urged that it would be inconvenient to send cases from the Chancery Division to be tried in Middlesex before a common law judge; but I cannot see that there would be greater inconvenience in this than in trying a Queen's Bench action before a judge of the Common Pleas or Exchequer Division. It was also contended that the fact that there is no provision under the new rules for obtaining new trials in actions attached to the Chancery Division, is an indication that it was not intended to alter the practice

of the Court of Chancery as to the trial of actions by a jury. I think that this objection is answered by Order xxxix, rule 1, the effect of which is that applications for new trials of actions in the three common law divisions need not now be made, as under the old practice to the court to which the action is attached, but may be made to any divisional court. But as to actions in the Chancery Division there was no intention to make a change in the mode of applying for a new trial; application may still be made to the judge of the Chancery Division before whom the action is set down. I think, therefore, that the view taken by the Master of the Rolls is not only consistent with the act and the rules, but that it will most promote the public convenience that all actions from any division shall be tried at one place and included in one list.

BRAMWELL, J.A.: I am of the same opinion. I merely wish to make two observations. It is argued on behalf of the appellants that the provisions in the act directing that there should be only one list of actions for trial by jury only applied to the common law divisions. If that be so, it is difficult to see what need there was for a provision that the cases should be tried by judges of these divisions only. It appears necessarily to follow from that enactment that the judges of those divisions are to try jury cases from the Chancery Division also. The other observation is this. The new rule 29*a* of Order xxxvi of December, 1876, which was referred to by Mr. Sladen, provides that "where in any action in the Chancery Division the action or any question at 756] issue in the action is ordered *to be tried before any commissioner or commissioners of assize, or at the London or Middlesex sittings of any division other than the Chancery Division, the order directing such trial shall state on its face the reason for which it is expedient that the action, question, or issue should be so tried and should not be tried in the Chancery Division." It does not follow that this rule assumes that there are to be sittings of the Chancery Division in London and Middlesex for trials by jury, for there are sittings of that division for trials of actions in London and Middlesex without juries. Besides, the rule only applies to a case where an order has been made, and not to an action which goes, so to speak, of its own accord to be tried at the Middlesex sittings. It applies to cases in which a place is named by the plaintiff in his statement, and the judge orders the action to be tried elsewhere, and to cases where, under rule 29 of Order xxxvi, the judge orders an issue to be tried before commissioners, or at the assizes, or

in London or Middlesex. In both these cases when the order is made the judge must state his reasons. That supposes that a chancery judge would order an issue to be tried elsewhere than before himself. It certainly would be a curious thing if it was intended that a chancery judge should try the action before himself, and yet should send an issue arising in the action to be tried elsewhere. I cannot think that was intended. The appeal must be dismissed, and the action must be set down to be tried in the general list. The costs of all parties will be costs in the cause.

Solicitors: *C. Gatliff; Ottaway.*

[4 Chancery Division, 757.]

C.A., Nov. 30; Dec. 9, 1876; Jan. 13, 1877.

*ASHLEY V. ASHLEY⁽¹⁾.

[757

Administration Suit—Deficient Estate—Unclaimed Dividends—Funds subsequently coming in.

Where a decree has been made for the administration of the estate of a deceased person, and the assets in hand have been distributed among his creditors, who have come in and proved, and at a later period further funds come in, and some only of the creditors who had proved come forward in answer to advertisements, the creditors who thus claim payment at the later period are not entitled to have the whole of the new fund applied so far as it will extend in payment of their claims, but only to receive ratable proportions of it according to the proportion which their debts bear to the total amount of the debts.

THE questions involved in these appeals from a decision of Vice-Chancellor Malins⁽²⁾ related to the disposal of certain funds in court, representing portions of the real and personal estate of a testator named Charles Pitfield, who died on the 4th of August, 1740. The funds represented, in part, moneys which, in the year 1792, were ordered to be paid to certain creditors of the testator, but were not so paid, and, in part, moneys forming portion of his personal estate which had been but recently realized. The following statement of the facts of the case is taken from the judgment of Baggallay, J.A.:

Shortly after the death of Charles Pitfield, the suit of *Hervey v. Ashley* was instituted for the purpose of establishing certain claims against his estate, and by the decree made in the suit on the 11th of August, 1748, it was, amongst other things, ordered that his personal estate should be applied in payment of his debts and funeral expenses and legacies in a due course of administration, and the usual accounts and inquiries were directed. On the 8th

⁽¹⁾ Affirming 15 Eng. Rep., 720.

⁽²⁾ Ch. D., 243; 15 Eng. Rep., 720.

of June, 1785, the cause of *Hervey v. Ashley*, with other causes supplemental to it, came on to be heard for further directions, and, the Master having certified as to the debts of the testator, and that his personal estate was insufficient for the payment of them, it was ordered that his freehold estates should be sold and the proceeds brought into court, 758] and it was further ordered that *the debts should be paid as directed by the original decree, and that in case the specialty creditors should exhaust any part of the personal estate, the simple contract creditors should stand in their place and receive satisfaction out of the real estate. In pursuance of the directions contained in this order, the freehold estates were sold, and, on the 27th of June, 1792, the Master reported that certain specialty creditors and creditors having specific and prior liens had been paid the amounts due to them to an amount in the aggregate exceeding £20,000; that the debts remaining due, together with interest on such of them as carried interest, amounted to £18,262 15s. 11d.; that the sums so paid to specialty creditors had been paid out of personal estate; and that the proceeds of the real estate were not nearly equal to the amount of personal estate which had been so applied. By an order made in the said causes, and dated the 21st of July, 1792, it was ordered that the several sums of cash mentioned in the order, and which had arisen from the real and personal estate of Charles Pitfield, should be applied in the first place in payment of certain costs, and in the next place in payment in full of such of the specialty debts as remained unpaid, and that the balance of such cash should be divided amongst the simple contract creditors in proportion to the amounts due to them; and it was referred to the Master to settle the proportions in which such amounts were to abate, and the balance of cash was to be paid to the simple contract creditors in the proportions to be so ascertained by the Master, or to the legal personal representatives of such of them as should be dead.

By his report, bearing date the 9th of August, 1792, the Master certified that he had set forth, in the first schedule thereto, an account of the specialty debts, amounting in the aggregate to the sum of £1,774, which were to be paid, pursuant to the order of the 21st of July, 1792, out of the sums of cash mentioned in the order, and that the aggregate amount of cash to be divided amongst the simple contract creditors, pursuant to the same order, was the sum of £8,026 7s. 11d., and that he had in the second schedule to his said report set forth the sums due to each of such

simple contract creditors respectively, and the proportions which each of such creditors was entitled to receive of the said sum of £8,026 7s. 11*d.*

The majority of the specialty and simple contract creditors *named in the report received the sums to which [759 they were entitled by virtue of the order and report, but the sums to which others of such creditors were entitled were not received by them, and, consequently, of the sums thus ordered to be applied in payment of debts there were left in court the several sums of £3,146 16s. 3*d.* cash and £425 10s. cash respectively, standing to the credit of the cause of *Sturt v. Hervey* (which was one of the supplemental causes), the former sum standing to the credit of the real estate account, and the latter to the general credit of the cause.

The fact that these sums had been left in court remained undiscovered or unnoticed until the year 1867, but on the 10th of July in that year an order was made by Vice-Chancellor Malins, on the petition of Henry Gerard Sturt, who was the heir-at-law or otherwise represented the real estate of Charles Pitfield, directing an inquiry as to the persons legally and beneficially entitled to them, and it was ordered that these sums, which had remained in court uninvested for seventy-five years, should be invested in bank annuities. These sums were accordingly invested, and at the date of the order of the Vice-Chancellor, from which the present appeals were brought, were represented by the sums of £4,024 Bank Annuities, £233 1s. 3*d.* on deposit, and £2 6s. 7*d.* cash, all standing to the credit of the real estate account, and the sums of £389 19s. 9*d.* Bank Annuities and £12 14s. 5*d.* cash to the general credit of the cause.

The testator, Charles Pitfield, had, at the period of his decease, an interest in the estate of one Alexander Pitfield, who had died some years previously, and who was a shareholder in the Shadwell Waterworks Company. Some time previously to the order of the 10th of July, 1867, the Shadwell Waterworks Company had been dissolved, and as its assets were about to be divided it was deemed advisable that the estate of Alexander Pitfield should be represented, and the order of the 10th of July, 1867, was accordingly made in the cause of *Ashley v. Ashley*, which was a suit for the administration of the estate of Alexander Pitfield, as well as in the cause of *Hervey v. Ashley*, and in the causes supplemental to the same respectively; and one Harvey Dibben was appointed by that order a trustee of the will of Alexander Pitfield, in the place of the deceased

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760] trustee thereof, and it was ordered that he should *represent the estate of Alexander Pitfield for the purposes of the proceedings in the matter of the Shadwell Waterworks.

The shares of the Shadwell Waterworks were personal estate, and, by reason of the proceedings in the above matter, further sums of considerable amount were paid to the credit of the cause of *Sturt v. Hervey*, "The account of Charles Pitfield's one-fourth of two shares in Shadwell Waterworks," and were invested; and by an order made by the Vice-Chancellor Malins on the 15th of January, 1875, upon the petition of Henry Gerard Sturt, it was ordered that, in addition to the inquiry directed by the said order of the 10th of July, 1867, it should be inquired who were the persons legally and beneficially entitled to the funds so paid and transferred.

The inquiries directed by the orders of the 10th of July, 1867, and the 15th of January, 1875, were prosecuted in the chambers of the Vice-Chancellor, and, with a view to the inquiry directed by the order of the 10th of July, 1867, advertisements were inserted in the London *Gazette* and divers newspapers, and by the certificate, dated the 5th of April, 1875, and approved by the Vice-Chancellor on the 20th of the same month, it was certified that the sums of cash mentioned in the order of the 10th of July, 1867, consisted of sums not claimed by and not paid to certain of the specialty and simple contract creditors to whom, pursuant to the order of July, 1792, and the report of August, 1792, the same were payable, and that no claim had been established to such sums; and it was further certified that the several sums of Bank Annuities and cash mentioned in the order of the 15th of January, 1875, formed part of the personal estate of Charles Pitfield, and were in the first instance applicable to the payment of the balances due to his simple contract creditors, after deducting the sums paid or appropriated in part satisfaction thereof under the order and report of July and August, 1792. And it was further certified that the only claims which had been established in respect of such last-mentioned balances were the claims of Louisa Moreton Dyer, as administratrix *de bonis non* of Elizabeth Swainson, deceased, and the Honorable Henry Cavendish Butler, on behalf of the estate of Solomon Ashley, deceased, which Elizabeth Swainson and Solomon Ashley were two of the simple contract creditors of 761] *Charles Pitfield, whose names were set forth in the second schedule to the report of the 9th of August, 1792.

The amounts of the debts of Elizabeth Swainson and Sol-

oman Ashley, as set forth in the second schedule to the report of August, 1792, were £2,788 5s. 3d. and £1,042 16s. 11d. respectively, in respect of which the apportioned sums of £2,016 0s. 4d. and £754 0s. 2d. were paid, leaving the respective balances of £772 5s. 4d. and £288 16s. 9d. unpaid. It appeared from the proceedings in the cause that these debts bore interest at £5 per cent. per annum.

It further appeared from the certificate that Louisa Moreton Dyer and Henry Cavendish Butler claimed interest on the above balances after the rate of 5 per cent. per annum from the 9th of August, 1792, and that the principal sums so claimed by them, with interest to the date of the certificate, amounted to the sums of £3,888 2s. and £1,450 19s. 3d. respectively.

On the 23d of April, 1875, a summons was taken out by Thomas John Pitfield, who had been duly appointed to represent the estates of Alexander Pitfield and Charles Pitfield, to vary the certificate by striking out so much thereof as certified that the several sums of stock and cash mentioned in the order of the 15th of January, 1875, were in the first instance applicable to the payment of the balances due to the simple contract creditors of Charles Pitfield and all subsequent findings consequent thereon, and such summons was adjourned to be heard in court at the same time as a petition which had been presented by Louisa Moreton Dyer and Henry Cavendish Butler, praying, in substance, that the costs of all parties of and incident to the application and consequent thereon, including in the costs of the petitioners the costs of tracing out and investigating the title to the funds in court as between solicitor and client, might be taxed and paid out of the sums of cash and stock in court, and that, out of the residue of such stock and cash, the balances claimed to be due to them, with further interest at the rate of 5 per cent. from the date of the certificate, might be paid.

Such summons and petition came on to be heard before the Vice-Chancellor Malins, and on the 19th of November, 1875, it was ordered that the costs of the petitioners and respondents, *and of the official solicitor, of and [762 incident to the petition and consequent thereon, should be taxed as between solicitor and client, and when taxed should be paid out of certain of the moneys which had arisen from the interest of Charles Pitfield in the Shadwell Waterworks. And it was declared that five several sums of bank annuities and cash standing to the credit of *Sturt v. Hervey*, which represented the moneys which had not been paid pursuant to the order and report of July and

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August, 1792, were divisible among such of the creditors of Charles Pitfield mentioned in the first and second schedules to the report of the 9th of August, 1792, as had not received the amounts of their debts or the sums apportioned in respect thereof. And it was further declared that the simple contract creditors of Charles Pitfield mentioned in the second schedule to the report of the 9th of August, 1792, were entitled, out of the several other sums of bank annuities and cash standing to the credit of the said cause, and which represented the proceeds of the interest of C. Pitfield in the Shadwell Waterworks, subject to the payment of the costs thereinbefore directed to be taxed and paid, to be paid the balances due to them respectively, pursuant to the order and report of July and August, 1792, together with interest on the balances of such of the respective debts as carried interest after the rate of 5 per cent. per annum from the 9th of August, 1792, until the day of payment.

From that order of the Vice-Chancellor three appeals were brought, the first by the petitioners, L. M. Dyer and H. C. Butler, the second by Thomas John Pitfield, in the interest of the next of kin, and the third by Lord Allington, formerly Henry Gerard Sturt, as the testator's real representative.

The appeals came on to be heard on the 3d of April, 1876, and the court took an objection to the form of the advertisements, as not well adapted, in the peculiar circumstances of the case, to attract the attention of persons interested. The appeals were, therefore, directed to stand over till further advertisements had been issued. In consequence of the fresh advertisements several additional claims were brought forward. Two of these claims were in respect of specialty debts included in the first schedule to the report of August, 763] 1792, and the others were similar to those *of the petitioners; no claim being brought forward in respect of any debt not included in the report of August, 1792.

1876. Nov. 30; Dec. 9. The appeals now came on to be disposed of, and, by consent of the parties, were heard by two judges, James, L.J., and Baggallay, J.A.

Glasse, Q.C., and *Murray*, for the petitioners, L. M. Dyer and H. C. Butler: Where an estate is administered for the benefit of creditors, those only who come in participate, and may thus, if the other creditors neglect to come in, obtain payment in full, though the estate is insolvent. According to the same principle, even where an order has been made for distribution of the assets in hand among particular cred-

itors, and then further assets come in, the court has been in the habit of applying the whole of the fresh assets in payment of those creditors who come in again to claim their rights. This was long the settled practice, though there are few reported cases on the point. *Williamson v. Naylor* (') and *Wild v. Banning* (") are the earliest cases in print, and the more recent cases of *In re Cunningham's Trust* (V.C.W., April, 1865), *Horncastle v. Sewell* (M.R., 1868), *Newton v. Bennett* (V.C.M., 1871), *Smith v. Smith* (M.R., December, 1871), *Hughes v. Lyon* (V.C.S., 1870), *Stuart v. Tichborne* (May, 1873), *Stables v. Aitcheson* (July, 1873), are all the same way. *Alderson v. Petrie* (before Lord Selborne in 1873) did not relate to a new fund coming in. It was thought necessary to insert in the Bankruptcy Act, 1869, a special provision—sect. 116—that unclaimed dividends should not go to the other creditors. No laches is to be imputed to the petitioners, *Dickenson v. Lord Holland* ("); and the Statute of Limitations is not stopped by the decree as against creditors who do not come in: *Watson v. Birch* (').

[JAMES, L.J.: There is a decree establishing the rights of a certain number of creditors. Any one who takes out representation to any one of them is in the same position as the petitioners. Why may not the Crown take it out?]

*The Crown must prove intestacy. There may be [764 representation going on till the present time, and no claim have been made because the debts were satisfied *aliunde*, and the court presumes such satisfaction to have taken place if the creditors do not come forward: *Hercy v. Dinwoody* (').

J. Pearson, Q.C., and *Pemberton*, for the official solicitor.

[JAMES, L.J.: I think we are bound by *Alderson v. Petrie* as to the actually apportioned funds.]

We contend that the same rule must apply to the new funds. When a creditor is found entitled, he is in the same position as a legatee. Now, if a deficient estate had been apportioned among pecuniary legatees, and then fresh assets came in to an extent not sufficient to pay the legacies in full, the new assets clearly would be apportioned among the legatees, not merely among those who came forward to claim. In the cases referred to as supporting the claim of the petitioners, the court did not decide anything to help them. The order was worked out erroneously in the ab-

(1) 3 Y. & C. Ex., 208.

(2) Law Rep., 2 Eq., 577.

(3) 2 Beav., 310.

(4) 15 Sim., 521.

(5) 2 Ves., 87.

sence of any one to dispute the claims of the creditors who were present. In *Wild v. Banning* ⁽¹⁾ the only question decided by the court was between the testator's personal representatives and the creditors. No general reference was made as to who were entitled, and no one was present who was interested in arguing that the creditors who did not come forward on the second occasion were entitled to participate. In *Williamson v. Naylor* ⁽²⁾ the real question was whether the dispositions of the will were legacies or admissions of debt; and it appears ⁽³⁾ that the testator referred to the fact of his having satisfied some of his creditors. The exclusion of creditors who do not come in to claim under a common administration decree furnishes no principle applicable to the present case. Creditors cannot be found out in any other way than by advertising for them to come in and make their claims, and those who do not come in are excluded on the ground that they are presumed not to exist. That is quite different from excluding persons who have been found by the court to be creditors. Suppose an executor to have divided all the assets in *hand among the creditors then known. If fresh assets afterwards came in, nobody would think of advising him that he would be justified in applying them in payment of the creditors who were then forthcoming, to the exclusion of such of the others as could not then be found.

Higgins, Q.C., Lovell and Udal, for the next of kin: The order of 1792 was final; there is no direction to compute subsequent interest. No liberty to apply is reserved. The suit could not have been revived. As to the old apportioned fund, we say that the petitioners have got all they were entitled to, and have no shadow of claim to a further share. What the creditors who do not now appear to have abandoned belongs to us, there being no one else who claims a title. Then, as to the Shadwell Waterworks fund, it is a derelict, and *prima facie* belongs to us.

[JAMES, L.J.: I should say that *prima facie* it belongs to the creditors.]

No doubt we take subject to their claims; but as to those who do not appear, it must be presumed that their claims have been satisfied.

[JAMES, L.J.: It would be a very forced presumption that somebody else has paid a man's debts fifty years after his estate has been administered by the court.]

The creditors who do not come in lose their rights by

(1) Law Rep., 2 Eq., 577.

(2) 3 Y. & C. Ex., 208.

(3) Page 215.

lapse of time: *Hercy v. Dinwoody* ⁽¹⁾; *Hunton v. Davies* ⁽²⁾; *Wilkinson v. Lovell* ⁽³⁾; *Ex parte Dewdney* ⁽⁴⁾. Creditors can come in at any time, so the fund cannot be considered as appropriated to a class ascertained at a past time, *Lashley v. Hogg* ⁽⁵⁾, but belongs to those who come in. The fund then belongs to the next of kin, subject to the claims of creditors who now come in to establish them. Interest ought not to be allowed them, or if it is allowed, the sum divided in 1792 ought to be apportioned between the principal and interest then due; and interest only at 4 per cent. on the residue of principal allowed: *In re European Central Railway Company* ⁽⁶⁾.

**Hastings, Q.C.*, and *Temple Cooke*, for the real [766 representative: We contend that this is a fund to be dealt with as a new fund, and that before anything is paid to the next of kin the real estate ought to be recouped.

Glasse, in reply: There should not be any such apportionment of the payments in 1792 between principal and interest as is contended for. The payee has a right to attribute. *Sterndale v. Hankinson* ⁽⁷⁾ shows that the Statute of Limitations cannot run.

[He also referred to *Creuze v. Hunter* ⁽⁸⁾, *St. John v. Boughton* ⁽⁹⁾, and *Berrington v. Evans* ⁽¹⁰⁾.]

1877. Jan. 13. The judgment of the Court (James L.J., and Baggallay, J.A.) was delivered by BAGGALLAY, J.A., who, after stating the facts, continued:

On behalf of the appellants, L. M. Dyer and H. C. Butler, it has been contended that they are entitled to the relief prayed by their petition; and that, at any rate, they, and such other of the claimants as are similarly circumstanced to themselves, are entitled to be paid the full amounts of the balances and interest claimed by them out of the funds which have arisen from the testator's interest in the Shadwell Waterworks, if such funds are sufficient for that purpose, or to share ratably therein if such funds are not sufficient for the payment of principal and interest in full. On behalf of the appellant, Thomas John Pitfield, it has been contended that the Vice-Chancellor ought not to have declared that the simple contract creditors were entitled to be paid the balances due to them, with interest, out of the funds in the said order mentioned, but that the next

⁽¹⁾ 2 Ves., 87, 91.

⁽²⁾ 2 Rep. in Ch., 44.

⁽³⁾ 2 Dick., 601.

⁽⁴⁾ 15 Ves., 479, 495.

⁽⁵⁾ 11 Ves., 602.

⁽⁶⁾ *Ante*, p. 33.

⁽⁷⁾ 1 Sim., 393.

⁽⁸⁾ 2 Ves., 157.

⁽⁹⁾ 9 Sim., 219.

⁽¹⁰⁾ 1 Y. & C., Ex., 434.

of kin of the said C. Pitfield ought to have been declared entitled thereto; or, at any rate, that interest ought not to have been allowed to the simple contract creditors in respect of the balances due to them, and that the next of kin of the said C. Pitfield ought to have been declared entitled to all such of the funds standing to the credit of the cause, from 767] whatever *source derived, as to which no creditors or representatives of creditors should establish their right. The appellant, Lord Allington, did not dispute the rights of the creditors to the benefits conferred upon them by the order of the Vice-Chancellor, but claimed so much (if any) of the surplus of the funds in court as had arisen from real estate as should remain after satisfying the just claims of the creditors, and also that any eventual surplus of the personal estate should go to recoup what had been paid by the real estate under the former orders. The official solicitor, who appeared as respondent upon all the appeals, supported the order of the Vice-Chancellor. In the course of the arguments our attention has been directed to a number of orders from time to time made in various matters, the circumstances of which are alleged to have been more or less similar to those at present under consideration; but, inasmuch as, for reasons which will presently be stated, the decisions in those matters do not appear to have been such as we can satisfactorily treat as binding authorities, we propose to deal with the questions now before us as if they were unaffected by authority.

Now, according to the recognized principles upon which the Court of Chancery always acted in the administration of estates, as well real as personal, the decree of the 11th of August, 1748, was equivalent to a judgment against the personal estate, whenever realized, of the deceased debtor, Charles Pitfield, in favor of all his creditors who should prove their debts in the cause; and this was extended to the real estate by the decretal order of the 8th of June, 1785. This being so, the order of July, 1792, and the report of August of the same year, are, in our opinion, conclusive as regards the several sums now in court, which represent moneys appropriated in 1792 to the payment of debts, and which were not so applied. Such moneys were, in fact, ordered by the court to be paid to the parties named in the report or their representatives, and to them only. It was as much their property as if there had been only one unsatisfied creditor, and the whole had been directed to be paid towards the satisfaction of his debt. The Court of Chancery had not, and this court has not, any jurisdiction to

order the payment to any other person, unless directed or authorized to do so by an act of Parliament. Nor, when the *question is fully considered, is there any sound [768 distinction to be drawn between the proceeds of the funds left in court in 1792 and those which have been since realized from the Shadwell Waterworks, other than this, that whereas the funds mentioned in the order of 1792, were appropriated to named creditors, those which have been since realized must, in accordance with a further principle recognized in the administration of assets, be appropriated not only to the same named creditors, or their representatives, but to such further creditors (if any such there are) as have succeeded in proving debts since the date of the former order. As before mentioned, the decree and order of 1748 and 1785 bound not only all the estate realized at the dates of such decree and order respectively, but all such estate as might thereafter be realized. Then, as regards the question of interest, the Court of Chancery has always acted upon the principle that, in the administration of an estate, all such portion of an interest-carrying debt as remains from time to time unpaid, without any neglect or default on the part of the creditor, carries interest after the original rate until payment. Interest must, therefore, be allowed upon the various balances certified by the report of August, 1792, as remaining due to simple contract creditors, but no interest can be allowed upon the amounts of any of the specialty debts mentioned in the first schedule to the report which may have been left in court by the parties entitled to receive them; the whole amounts due in respect of such specialty debts having been made payable to the parties entitled to them, it was through their own neglect or default that the same were not received. It does not appear that any of the new claims are in respect of sums appropriated to simple contract creditors by the report of 1792, but not received by them; but if any such shall be established, the parties establishing them will, for the like reason, be not entitled to interest except on the balances remaining due to them after such appropriation.

Upon the whole, then, we are of opinion that the declaration contained in the order of the Vice-Chancellor respecting the title to the funds in court which have arisen from the testator's interest in the Shadwell Waterworks is correct. We are further of opinion that he was quite right, upon the materials before him, in not *making any [769 order as regards the funds which represent the moneys left in court in 1792; but inasmuch as claims have since been

brought forward in respect of specialty debts included in sched. 1 to the report of August, 1792, and alleged to have been not yet paid, provision must be made for the payment out of the last-mentioned funds of the amounts of such claims as may be established.

The fact, certified in the earlier proceedings in the cause, that specialty debts had been paid out of personal estate to an amount very far exceeding the whole value of the real estates, makes it unnecessary at present to draw any distinction between the proceeds of real and personal estate, or between the persons respectively entitled to such several estates. It is extremely improbable that the estate will ever show a surplus after providing for all the debts of the testator, having regard to the large arrears of interest, and unless that event shall happen, it appears to us that neither the heir-at-law nor the next of kin can ever be entitled to anything.

These observations are sufficient to dispose of the questions under our consideration, but we think it right to express the views which we have taken of the cases which have been cited in the course of the argument. It has been strongly pressed upon us that through a long series of years it has been the uniform practice of the Court of Chancery, in cases similar to the present, where creditors have disappeared, to distribute the funds amongst those only of the creditors who should again appear and establish their claims, and the cases cited have been referred to as evidence of this practice. If we had found that such a uniform practice had existed for a lengthened period, we should have been extremely unwilling to break in upon it, but, having given our best consideration to the numerous cases to which our attention has been directed, we are of opinion that they fail to establish the existence of any such practice as has been alleged. The majority of the cases cited are not reported; but, through the diligence and research of the professional advisers of the parties to these appeals, we have been furnished with copies of the orders made in them and of the other material proceedings.

In some of the cases cited, and which have been much 770] relied upon, as, for instance, in *Williamson v. Naylor* (¹), *In re Cunningham's Trusts*, and *Smith v. Smith*, it will be found that the court simply made a decree or order for carrying into execution certain trusts for the benefit of creditors, and, having directed an inquiry as to who were entitled to the trust funds, eventually made an order for payment to the persons whose titles were certified.

(¹) 3 Y. & C., Ex., 208

There was not in any of these cases any general administration decree operating as a judgment in favor of the creditors. At the most, the orders for payment were only equivalent to the order of July, 1792, in the present case. Had there been any subsequent orders dealing with funds not taken out of court under the orders for payment, the case might have been different; as it is, it is clear that the cases are of no authority on the present occasion. It is very possible, indeed probable, that in these cases portions of the trust funds had been distributed amongst larger bodies of creditors before payment of the balance into court, but this is immaterial; there was no judgment except as regards the moneys paid into court.

Again, the facts of the case of *Wild v. Banning* ⁽¹⁾ hardly support the marginal note, for though the Master of the Rolls intimated an opinion that the creditors who ultimately established their claims would be entitled to divide the funds, he only decided that the trustee was not entitled to the unreceived funds, and he directed an inquiry as to who were entitled to them.

In the cases of *Stuart v. Tichborne* and *Stables v. Aitchison* the circumstances resembled those of the present case so far as the funds left in court in 1792 are concerned. In the year 1799, in the former case, and in the year 1827, in the latter, orders had been made for the distribution of certain funds ratably amongst certain named creditors, and portions of the apportioned funds which had not been taken out of court pursuant to such orders were in May, 1873, in the former case, and in July, 1873, in the latter, ordered to be apportioned between those creditors only who came in and established their claims in 1873. But these orders were made by Vice-Chancellor Malins before his attention had been directed to the decision of Lord Selborne in *Alderson v. Petrie*, to which reference will presently be made (indeed *Alderson v. Petrie* was not decided until after the [771] order was made in *Stuart v. Tichborne*); and, in the present case, the Vice-Chancellor dissented from the views which he had taken in those two cases and in the case of *Newton v. Bennett*, to which attention has also been directed, and adopted that upon which Lord Selborne acted in *Alderson v. Petrie*. And here it may be noted that, in most of the cases cited, though the original suits were instituted many years ago, the orders relied upon are of comparatively recent date. But, whilst the orders relied upon by the appellants fail to show any lengthened uniform practice in the

(1) Law Rep., 2 Eq., 577.

direction contended for by them, the case of *Alderson v. Petrie*, in its details, singularly illustrates the course, which, in our opinion, ought to be adopted in like cases, and as the details of this case have not as yet been fully reported, it may be convenient to refer to them.

The suit of *Alderson v. Petrie* was instituted at the close of the last century under the following circumstances: On the 1st of October, 1785, two indentures, bearing that date, had been executed for the benefit of the separate creditors of William Price and the joint creditors of William Price and Thomas Harris. Under the trusts of those indentures, funds of considerable amount came to the hands of the trustees and were applied in payment of dividends, but, in consequence of the difficulties which the trustees experienced in distinguishing the separate from the joint assets, the suit was instituted for the administration of the trusts of both deeds, and by the decree made by the Master of the Rolls on the 20th of February, 1801, accounts were directed as to the moneys received by the trustees and inquiries as to the debts due to the creditors.

By his report made pursuant to the decree, and bearing date the 1st of August, 1804, the Master stated that he had taken an account of the moneys come to the hands of the trustees, but that he was unable to ascertain the sources from which such moneys had been derived; and in the schedules to the report he set forth lists of the creditors who had proved their debts and the amounts due to them respectively. When the cause came on upon further consideration the court intimated that no distribution of the funds could be made unless the creditors could come to some agreement upon the subject, and thereupon an agreement, dated the 2d of October, 1804, was executed by the trustees and by all the creditors who had proved their debts under the decree, to the effect that the trust funds, from whatever source derived, should be distributed ratably between all the separate and joint creditors. Subsequently to the date of the report three other creditors proved their debts, and by an order made by the Master of the Rolls on the 28th of May, 1805, upon a petition stating these circumstances, it was ordered that, after payment of the costs thereby directed to be taxed, the Master should divide and apportion the residue of the funds then in court, and such other money as should be paid into court, amongst the several creditors whose names were set forth in the 1st and 2d schedules to the report, in proportion to their debts as set forth in the schedules, and the three creditors afore-

said, in proportion to the debts so proved by them. Now, it was by this order of the 28th of May, 1805, that the rights of the parties were determined, and it will be observed that it determined the parties who were to share in all the trust funds, as well those then in court as those which might thereafter be brought into court; being equivalent, therefore, to a decree for administration in due course. Accordingly, further funds having been brought into court in the interval between the date of the order and the apportionment by the Master, those funds were included in the apportionment, and it was so certified by the report of the Master bearing date the 22d of August, 1805.

Further remittances coming to the hands of the trustees sufficient to pay a further dividend of 8*d.* in the pound, they, out of court, paid dividends of that amount to most, but not all, of the creditors, and upon the petition of the surviving trustee that he might be at liberty to pay into court the amount of the unpaid dividends, and of further remittances which had subsequently been received, it was, by an order dated the 21st of December, 1812, ordered, that out of such sum as should be paid into court by the petitioner the dividend of 8*d.* in the pound should be paid to such of the creditors as had not received it, and that the residue of such sum, after payment of costs, should be divided amongst the several creditors whose names were set forth in the schedule to the report of the 22d of August, 1805, in proportion to their debts as set forth in such schedule.

*The master to whom the said cause was referred [773 made his report, dated the 6th of May, 1814, and thereby found that the unpaid dividends of 8*d.* in the pound amounted in the aggregate to £416 9*s.* 4*d.*, and were payable to the creditors mentioned in the schedule to his report, and he also found that further sums had been paid into court to the credit of the cause since the date of the said order, and that, after payment of costs, the fund divisible among the creditors named in the schedule to the report of the 22d of August, 1805, amounted to the sum of £4,144 4*s.*, and that he had apportioned the same amongst all the creditors named in the said report.

The sums so apportioned were paid to many of the creditors named in the report, but others of such creditors did not receive the amounts to which they were entitled. Nothing further was done in the suit until July, 1872, when a petition was presented to the Master of the Rolls by the representative of one of the creditors named in the schedules

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to the report of 1805, praying an inquiry who were entitled to the fund then standing to the credit of the cause, which amounted to £905 5s. 9d., and represented the apportioned sums which had not been taken out of court. An order was made to the effect prayed, and the representatives of several others of the creditors named in the schedule, some of whom had not received the sums apportioned to them in 1814, came in under it, and they, as well as the petitioner, having established their claims in chambers, contended that they were entitled to receive out of the fund in court, not only the sums apportioned to them and unreceived, but also so much more as would make up to them 20s. in the pound with interest, the fund in court being more than sufficient for that purpose. The matter was adjourned into court, and was heard by Lord Selborne in June, 1873, when his Lordship held that all the creditors named in the schedule had acquired a vested interest in any funds which subsequently became distributable, and that only the proportion of the fund which the debts of those who claimed payment at the subsequent period bore to the entire debts could be paid out, and that the rest must be retained in court.

The principle on which that decision was based is, in our judgment, unimpeachably sound, and we must act on the 774] same principle *in the case before us. The creditors who have been discovered will get everything to which they became entitled under the decrees and orders of the court, and we can give them no more. And the remainder of the fund which belonged, and belongs absolutely, to the other creditors, judicially ascertained and declared, must remain until some persons entitled come forward to claim it. If A. chooses to leave his money in court it does not thereby become the property of B. The fact that A. and B. were both creditors of C. can make no difference; still less if B. claims beneficially under C., an insolvent debtor.

Having regard to the benefit which the funds in court have derived from the prosecution of the inquiries in this case, we think that the costs as prayed by the petitioner and the costs of the appeals should be paid ratably out of the two funds.

Solicitors: *Eubank & Partington; Meynell & Pemberton; Lovell, Son & Pitfield.*

[4 Chancery Division, 774.]

V.C.M., June 17, 1876 : C.A., Jan. 13, 18, 1877.

In re UNIVERSAL NON-TARIFF FIRE INSURANCE COMPANY.

RITSO'S CASE.

Company—Liability of Directors—Agreement to take Shares.

R., the chairman of the board of directors of a company in which he held fifty shares, signed a letter of application for 450 more, striking out the reference to the payment of the deposit which was required on application for shares. There was some evidence to show that this application was made in pursuance of a previous promise by R. to become a holder of 500 shares, and that on the faith of this promise he had been elected chairman.

No notice was taken of the application till after seven months, when at a board meeting it was proposed and seconded that 450 shares should be allotted to R. R., who was present, handed in a letter withdrawing his application, and deposed that he had previously withdrawn it verbally. There was no proper evidence that the resolution to allot shares to R. had been carried, but a letter of allotment was sent him on the following day. The company was at this time in a hopeless state, and a resolution for winding it up was passed a fortnight afterwards :

Held, by Malins, V.C., that, although if R. had been an outside applicant the delay and the informality of the allotment would have exempted him from liability as to the 450 shares, he could not avail himself of the delay *and informality [775 which he, as chairman of the board of directors, was bound to have prevented, and that he was a contributory in respect of those shares.

Held, on appeal, that the offer by R. to take shares was not shown to have been accepted by the company before it was withdrawn by him, and that he was not liable in respect of the 450 shares.

[4 Chancery Division, 784.]

C.A., Feb. 2, 1877.

*JUDD V. GREEN.

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[1873 J. 36.]

Practice—Security for Costs—Dismissal of Appeal for want of Prosecution—Rules of Court, 1875, Order LVIII, r. 15.

An appellant who had been ordered to give security for the costs of an appeal from a decree failed to do so for nine months. At the end of that time, which was more than a year after the decree, the respondent moved to have the appeal dismissed with costs for want of prosecution, and the delay not being explained the court ordered accordingly.

In this case, the plaintiff having given notice of appeal from the decree dated the 12th of January, 1876, an order was made by the Court of Appeal on the 25th of April, 1876, on motion by the several defendants, that the plaintiff should procure some sufficient person in his behalf to give security, according to the course of the court, by bond to the Clerks of Records and Writs, in the penalty of £150, to answer the costs of the appeal, with an option to the

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plaintiff, in lieu of such security, to pay £150 into court to the credit of the cause, "Security for costs of appeal;" and that the plaintiff's appeal should not be placed in the paper until fourteen days after such security had been given or such payment into court made, and notice thereof given to the defendants.

The plaintiff not having given any bond, nor made any payment into court in pursuance of the above order, one of the defendants, on the 27th of January, 1877, served notice of motion that the appeal might be dismissed for want of prosecution, and that the plaintiff might be ordered to pay the applicant his costs of the appeal, including the costs of his application for security and his costs of the present application. The plaintiff's delay was not accounted for by affidavit.

W. S. Owen, for the application.

Kekewich, and *W. Barber*, for the other defendants.

Everitt, for the plaintiff, stated his instructions to be that 785] the *plaintiff was endeavoring to raise the £150, and would be able to give security if further time were allowed.

THE COURT (James, L.J., and Brett and Amphlett, J.J.A.) made an order according to the terms of the notice of motion.

Solicitors: *Vallance & Vallance; Trinders & Curtis-Hayward; Harper, Broad and Battock.*

[4 Chancery Division, 785.]

C.A., Feb. 16, 1877.

In re BAILLIE'S TRUSTS.

Practice—Time for entering Appeal—Order under the Trustee Relief Act—Rules of Court, 1875, Order LVIII, r. 9.

The time within which an appeal must be brought from an order made under the Trustee Relief Act is twenty-one days.

In this case a sum of money had been paid into the Court of Chancery under the Trustee Relief Act, and invested in the purchase of Consols.

Madame von Gröndler and her husband, who were residing at Colberg in Prussia, presented a petition for payment of the fund out of court to them. On the 17th of December, 1875, Vice-Chancellor Malins made an order refusing the prayer of the petition. On the 12th of July, 1876, the petitioners gave notice of appeal against this order, and the

appeal came on to be heard before the Court of Appeal on the 16th of February, 1877.

Bristowe, Q.C., and *Everitt*, for the appellants.

J. Pearson, Q.C., and *Bush*, for the respondents, took the objection that the appeal was not brought within twenty-one days within Rules of Court, 1875, Order LVIII, rule 9⁽¹⁾. They referred to *the judgment of Brett, J.A., in [786 *In re National Funds Assurance Company* (*)].

Bristowe, Q.C., and *Everitt*, for the appellants: This appeal is not within the 9th rule. The words "in any other matter" must relate to matters similar to a bankruptcy or winding-up. In the present case the proceedings were commenced under the Trustee Relief Act before the Judicature Acts came into operation; and the 2d section of the Trustee Relief Act (10 & 11 Vict. c. 96) provides that every order made upon any petition under the act "shall have the same authority and effect, and shall be enforced and subject to rehearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the court." This order must therefore be treated for this purpose as an order made in an action, and as it is a final order between the parties, the time for appealing is one year. The observation of Brett, J.A., in *In re National Funds Assurance Company* was only an *obiter dictum*. At all events, the court has the power of extending the time, which, if necessary, we now ask for.

JAMES, L.J.: I think there is no distinction in principle between an order under the Trustee Relief Act and one under the Companies Act, 1862, as to which it has been already decided that the appeal must be within twenty-one days. But I think this is a case in which special leave for appeal ought to be given.

BAGGALLAY, J.A., and BRAMWELL, J.A., concurred.

The respondents' counsel having waived the necessity of a formal application for special leave, the appeal was then heard, and at the conclusion of the arguments the court reversed the Vice-Chancellor's decision, and granted the prayer of the petition.

Solicitors: *Fielder & Sumner*; *J. P. Theobald*.

(1) Order LVIII, r. 9: "The time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the Companies Act, 1862, or any act amending the same, or any order or decision made in the matter of any bank-

ruptcy, or in any other matter not being an action, shall be the same as the time limited for an appeal from an interlocutory order under rule 15." That is, three weeks.

(2) 4 Ch. D., 314.

[4 Chancery Division, 787.]

C.A., Feb. 20, 1877.

787]

*CUMMINS V. HERRON.

[1871 C. 221.]

Practice—Time for Appealing—Interlocutory Order included in Order on Further Consideration—Rules of Court, 1876, Order LVIII, r. 16.

Where an order on an interlocutory application and an order on further consideration are made at the same time and are included in one order, an appeal from the order on the interlocutory application must nevertheless be brought within twenty-one days, although such order in effect determines the issue in the cause.

THE bill in this case was filed by the owner of a corn-mill to restrain the defendant, who was the proprietor of a skin-yard and tan-works, from polluting the stream which ran through the plaintiff's mill, and for recovering compensation in damages for past injury.

At the hearing of the cause an inquiry was directed whether the plaintiff had sustained any and what damages from the fouling of the stream. After various proceedings in the cause, the Chief Clerk made his certificate, dated the 6th of April, 1876, by which he certified that the plaintiff was entitled to £200 compensation for the damages sustained by him. The defendant took out a summons to vary this certificate, and the summons was adjourned into court and ordered to come on with the further consideration of the cause.

The cause was heard on further consideration on the 15th of May, 1876, when Vice-Chancellor Hall made an order, on further consideration and on the summons, to the following effect: "This court doth not think fit to make any order upon the said application of the defendant, and doth order that the defendant pay to the plaintiff £200, with interest at £5 per cent. from this date. And it is ordered that a perpetual injunction be awarded against the defendant to restrain him, his workmen, &c., from discharging or permitting to be discharged any refuse or foul water from his skin-yard and tan-works into the brook, &c. And it is ordered that the defendant do pay to the plaintiff his costs of the suit, including his costs of the notice for injunction and the costs of the several applications to vary the Chief Clerk's certificate," &c.

788] *On the 31st of July, 1876, the defendant gave notice of appeal from the whole of this order.

On the appeal being opened an objection was made that the appeal from the refusal to vary the Chief Clerk's certifi-

cate ought to have been brought within twenty-one days, and was, therefore, now too late under Rules of Court, 1875, Order LVIII, rule 15.

Dickinson, Q.C., and *Nalder*, for the appellants: An order made on application to vary a certificate of the amount of damages payable by the defendant can hardly be called an interlocutory order, for it determined in effect the whole suit.

[JESSEL, M.R.: There can be no doubt that such an order is an interlocutory order, whatever its results may have been.]

Assuming that the order would have been interlocutory if standing alone, it is here incorporated in the order on further consideration, and the whole formed one order, and the appeal is from the whole. Therefore a year is allowed for the appeal. It cannot be intended that a person intending to appeal must pick a final order to pieces and appeal from part within twenty-one days and part within a year. The refusal of the application to vary the certificate in the present case concluded the whole matter, and if that stands, it is useless to argue against the injunction. So that, by not appealing against the interlocutory order within twenty-one days, we practically lose our right of appeal against the final order in the suit.

Eddis, Q.C., and *T. L. Wilkinson*, for the plaintiff, were not called on.

JESSEL, M.R.: As regards the appeal from refusal of the application to vary the certificate, the rule is clear that on the refusal of an interlocutory application the time for appeal is twenty-one days from the refusal, whether the order is drawn up or not. In this case much more than twenty-one days have elapsed. The only new point is that this refusal to vary the certificate was made in *an order which [789 also contained an order on further consideration, which is a final order. But that makes no difference; although the orders are on the same piece of paper, yet one order is made on the interlocutory application and the other on further consideration. Therefore the appeal from the refusal to vary the certificate is now too late and must fail. As the whole merits of the case were decided by the Chief Clerk's certificate, the appeal from the order on further consideration must also be dismissed with costs.

JAMES, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Wilkins, Blyth & Fanshawe*, agents for J. R. Cobb, Brecon; *Hunt & Sons*, agents for J. Jay, Hereford.

[4 Chancery Division, 789.]

C.A., Feb. 22, 1877.

Ex parte SHEIL. In re LONERGAN.

Loan to Trader—Interest varying with Profits—Mortgage to secure Loan—Bankruptcy of Borrower—Rights of Trustee—Partnership Law Amendment Act, 1865 (28 & 29 Vict. c. 86), ss. 1, 5.

A loan was made to a trader at a rate of interest varying with the profits of his business, the amount of the loan and the interest being secured by a mortgage to the lender of the lease of the house where the business was carried on, and of the good-will of the business. The trader became bankrupt:

Held, that the rights of the mortgagee under his mortgage were in no way affected by sect. 5 of the Partnership Law Amendment Act, 1865.

Ex parte Macarthur (!) overruled.

THIS was an appeal from a decision of Mr. Registrar Spring Rice, acting as Chief Judge in Bankruptcy.

Shortly before the 1st of March, 1873, E. B. Lonergan purchased the good-will of the business of a wine merchant, which had been previously carried on under the firm of Walmsley & Co. at No. 33 Mount Street, and the lease of that house, and commenced carrying on the business there. To enable him to do so, he borrowed £2,000 of Edward Sheil upon the security of a mortgage of the lease of the house and the good-will of the business. The mortgage deed was dated the 1st of March, 1873, and by it Lonergan covenanted that he would on the 1st of September 790] then next *pay to Sheil the £2,000, together with such a sum in lieu of interest as should be equal to one-half of the net profits of the business from the 1st of March until the 1st of September, 1873, and that, if the £2,000, or any part thereof, should remain unpaid after the 1st of September, 1873, Lonergan would, so long as the same sum or any part thereof should remain unpaid, pay to Sheil on every 1st of March and 1st of September such a sum in lieu of interest as should be equal to one-half of the net profits of the business for the half year then immediately preceding. And Lonergan assigned to Sheil the leasehold house, No. 33 Mount Street, and the good-will of the business, to hold the leasehold premises for the residue of the term granted by the lease thereof, and to hold the good-will absolutely, but subject as to both to redemption upon payment by Lonergan of the £2,000, and also all such sums in lieu of interest as were thereinbefore covenanted to be paid at the times thereinbefore appointed for the payment thereof respectively.

(!) 40 L. J. (Bkey.), 86.

Lonergan carried on the business until February, 1876, when he filed a liquidation petition. On the 20th of March his creditors resolved on a liquidation by arrangement, and appointed R. E. James trustee. The trustee entered into a contract to sell the leasehold premises and the good-will of the business for £1,250, and the purchaser paid a deposit. The trustee applied to the court for an order that, on payment by the purchaser to the trustee of the balance of the purchase-money, Sheil might be directed to concur with the trustee in assigning the mortgaged property to the purchaser free and discharged from all claims by Sheil in respect of his mortgage, and that, if necessary, he might be directed to deliver up the mortgage deed to the trustee or to the purchaser.

The registrar refused the application.

The trustee appealed. By his notice of appeal he asked that the registrar's order might be discharged, and that it might be declared that Sheil was not entitled, by virtue of his mortgage or otherwise, to recover any portion of the principal money, profits, or interest expressed to be secured to him thereby, until the claims of the other creditors of Lonergan for valuable consideration in money or money's worth had been satisfied, and that proper directions might be given for enabling the sale of the leasehold premises and good-will to be completed, and the purchase-money received by the trustee. The notice also stated that the trustee would not insist on the mortgage deed being delivered up by Sheil.

Bristowe, Q.C., and *Dauney*, for the appellant: The effect of sect. 5 of the Partnership Law Amendment Act, 1865 (¹), is to postpone the mortgagee to the other creditors, even in respect of his mortgage security. This was expressly decided in *Ex parte Macarthur* (²). The word "recover" is the strongest word which could have been

(¹) Sect. 1: "The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such."

By sect. 5: "In the event of any such trader as aforesaid being adjudged a bankrupt, . . . the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, . . . until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied."

(²) 40 L. J. (Bkcy.), 86.

used ; if the registrar's decision is right it will be cut down to "prove."

[JAMES, L.J.: What is there in the act to prevent the lender from availing himself of a right of set-off, if he had one, under sect. 39 of the Bankruptcy Act, 1869 ; or what is there to prevent him from foreclosing his mortgage? That would not be "recovering" anything out of the bankrupt's assets.

JESSEL, M.R.: The act says nothing about security. Your argument would equally apply to a security given by a third party.]

They referred also to *Ex parte Mills* (*).

De Gex, Q.C., and *Finlay Knight*, for the mortgagee, were not called upon.

JESSEL, M.R.: I am of opinion that this appeal must fail. The 5th section of *the act provides that a person who lends money under the circumstances mentioned in sect. 1 shall, in the event of the borrower being adjudicated a bankrupt, "not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan," in competition with the other *bona fide* creditors of the borrower. That is all.

Now the respondent was a lender of £2,000 at a rate of interest varying with the profits. He was to receive an amount of interest equal to half the profits, if any, and consequently the agreement was within the words of the 1st section, and the question we have to decide is whether he, having taken a legal mortgage of a leasehold house in which the business was carried on, which was assigned to him in the regular way for the residue of the term subject to redemption, has lost the benefit of his security so as to be by the 5th section postponed in respect of it to the claims of the other creditors of the mortgagor. There is not a word in the 5th section inflicting any penalty or disability or any confiscation upon him in respect of the mortgage which he has so taken. He is not seeking to recover anything in the shape of money. He only says: "I have or can obtain the legal possession of the house. I have that for a legal term of years. I do not ask to recover anything from the bankrupt or his estate." That being so, it does not appear to me that the section applies to him at all. He still retains the possession of the house, subject to redemption, as before the bankruptcy, and if the trustee in the bankruptcy thinks fit to say, "I will take the house from

(*) Law Rep., 8 Ch., 569.

you," he is at liberty to do so upon the terms of the mortgage deed.

Now we are asked to extend this, a penal statute, beyond its terms, to make it equivalent to confiscating the property of the mortgagee. To do that would not be to carry out the object of the Legislature but to legislate, which is a thing we ought not to do. There are several instances in which a mortgage debt may be irrecoverable, and in which nevertheless the mortgagor cannot redeem the mortgaged property without paying the amount secured by the mortgage deed. One instance has been already referred to by the Lord Justice in which, although the mortgage debt may be barred, because there has been neither payment nor acknowledgment for upwards of twenty years, yet the mortgagee may be *entitled to recover the estate by [793 reason of the mortgage being of a reversionary estate, and the tenant for life having lived beyond the twenty years, so that, on the dropping of the life, the mortgagee could recover in ejectment, or in an action for the recovery of land, as it is now called. He having recovered the estate, the mortgagor wants to get it from him. Then, though the debt is barred, if he comes to redeem he must pay the debt. Another instance familiar to real property lawyers was where the debt had been extinguished at law by the taking of the debtor's body in execution. Still the mortgagor could not get back the estate without payment of the money secured by the mortgage deed. The right of the mortgagee to keep the estate did not depend upon his right to recover the debt in the action, but the two rights were wholly independent the one of the other. His right was, not to recover the money, but to keep the estate till the money was paid, which is a totally different thing. It appears to me, therefore, that the decision of the registrar is correct, and that it ought to be affirmed.

JAMES, L.J.: I am of the same opinion. I think the word "recover" means recover, and does not mean "retain."

BAGGALLAY, J.A.: I agree.

Solicitors for trustee: *Tamplin, Tayler & Joseph.*

Solicitors for mortgagee: *Bridges, Sawtell & Co.*

See 18 Eng. Rep., 889.

For the recent cases under the first question discussed, 18 Eng. Rep., 889, see.

Canada, Upper: Matter of Randolph, 1 Appeal Rep., 815.

English: Bullen v. Sharp, 14 Law T. Rep., N.S., 72; Mollwo v. Court, etc., 9 Moore, P. C., N.S., 214.

Kansas: Shepard v. Pratt, 16 Kans., 209.

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Maryland: Rowland v. Long, 45 Md., 439.

New York: Lamb v. Grover, 47 Barb., 817; Haas v. Roat, 16 Hun, 526; Eager v. Crawford, 8 N. Y. Weekly Dig., 246, Court Appeals. Richardson v. Hughitt, 8 N. Y. Weekly Dig., 249, Court Appeals.

Ohio: Harvey v. Childs, 28 Ohio St. R., 839; Farmers, etc., v. Ross, 29 Ohio St. R., 429.

Pennsylvania: Hart v. Kelly, 83 Penn. St. R., 287.

Tennessee: England v. England, 1 Baxter (Tenn.), 108; Bell v. Hare, 12 Heisk., 814.

For cases under the *second class*, see,

Alabama: Hawze v. Patterson, 53 Ala., 205.

Maine: Chapman v. Eames, 67 Maine, 452; Holden v. French, 68 Maine, 241.

Maryland: Rowland v. Long, 45 Md., 440.

Michigan: Detroit, etc., v. White, 85 Mich., 77.

New York: Munro v. Whitman, 8 Hun, 533.

A contract that one party shall furnish money and the other perform work for a given business, and that its net profits shall be equally divided between them, makes, without reference to their intent, a partnership as to third persons: *Pettee v. Appleton*, 114 Mass., 114.

In a feigned issue to try the right to certain cattle, A. offered evidence that he purchased the cattle through B., who was his agent, in the name of B.; that it was agreed that the latter should butcher and sell the meat, and out of the proceeds return to A. the cost and one-fourth of a cent per pound of dressed meat additional, and that B. should have the balance. Upon this evidence the court granted a nonsuit, on the ground that it did not tend to prove an exclusive ownership in A., but established a partnership. Held, (reversing the court below) that this agreement between A. and B. did not constitute a partnership *inter se*, or as to third parties; and that the case should have been submitted to the jury to say what was the actual relation of the parties: *Dale v. Pierce*, 85 Penn. St. R., 474.

Plaintiff, defendant and E. entered into a contract by which E. leased to plaintiff a furnace and fixtures "for a term long enough to make and manufacture 1,000 tons of iron," and agreed to furnish the ore for that purpose at a specific price per ton; plaintiff agreed to purchase ore, to repair the furnace, and to manufacture the iron; defendant was to act as plaintiff's agent in the work of repair and in manufacture; the iron manufactured was to belong to plaintiff, who was to sell the same, and, out of the avails, to retain all advances made by him, with interest, together with two per cent. on the net sales, and the amount of a certain note, and to pay the balance to defendant and E., as compensation for services and the use of the demised property. The parties went on under the contract. Defendant, with the knowledge and assent of plaintiff, sold the iron manufactured, using a portion of the avails in the purchase of materials and payment for labor; he failed to pay over a portion of the proceeds; he overpaid for labor and materials; and he appropriated to his own use profits arising from the buying and selling of land and personal property to which plaintiff was entitled, and which were connected with the other transactions. In an action to recover the amount due plaintiff, defendant pleaded his discharge in bankruptcy. Held (*Earl, J.*, dissenting) that the parties to the contract had a mutual interest in the sales, and the obligation incurred by defendant was not a debt created while he was acting "in a fiduciary capacity" within the meaning of the bankrupt act (§ 83); and that the discharge in bankruptcy was a good defence: *Barber v. Sterling*, 68 N. Y., 267.

An agreement between A. and B. contained the following terms: A. was to furnish B., a mill owner, with materials for making goods and with money to pay the men. The goods when manufactured were to be consigned to such person as A. should direct, and the goods in all stages of manufacture, and the proceeds thereof when sold, were to belong to A. The materials furnished and advances made were to be entered on the books of A. against B. At the termination of the agreement A. was to account to B. for

all sums expended and received by A., and to pay over to B. in full for his services any balance found over and above the cost and expense of the stock and material, cash advanced, interest, commissions, and certain other charges. B., if requested, was to furnish A. with his notes for his use to an amount not exceeding the value of the stock and materials furnished by A., which notes might be discounted by A. and were to be paid by him when due. It was also agreed that no partnership or agency was to be created, but only an agreement to furnish materials to be manufactured, and an agreement to manufacture. After this, A. assigned all his property, including the contract with B., to trustees, in trust to convert the same into money and to divide the proceeds, after deducting costs and charges, among A.'s creditors. At the time of this assignment large quantities of stock and materials had been furnished B. and advances made to him, and he had given notes which were then outstanding. There were also goods in the hands of the consignees for sale, and goods in process of manufacture by B. The trustees made advances to have the latter completed, and afterwards received the proceeds of these goods and of those in the hands of the consignees. Held, on a bill in equity brought by the trustees against the creditors, that the holders of B.'s notes were not entitled to be first paid out of the proceeds of the goods manufactured by him: *Rindge v. Sanford*, 117 Mass., 460.

One who is under contract to take charge of a stone-yard for a specified time, as superintendent for the owners, to furnish all the moneys required to carry on the business, to pay for the labor and purchase the material, to keep an account of his expenses and sales, and receipts, and to report the same when required so to do, and who

is to receive in full for all the money, labor and time, so expended in said business, the net profits arising therefrom during the said period, acquires by virtue of his contract no title as against his employers in the articles manufactured, or the implements and appurtenances of the yard; and if he violates his agreement and removes said property, against the wishes of his employers, from their yard, they may maintain replevin for the same: *Detroit Frear Stone Works v. White*, 35 Mich., 77.

A. delivered wool and yarn to O., to be made into cloth, at a specified cost, to be paid by A. The wool and the yarn and the goods were to be continuously the property of A. O. began the manufacture of goods from the materials. Thereafter, the property came into the possession of M., as the assignee in bankruptcy of O. At that time it was in the condition of dyed wool, mixed with shoddy, and woollen yarns in the various stages of manufacture into cloth, and was of small market value, and not salable. A. demanded from M. the specific wool and yarn delivered to O. and the yarns in process of manufacture, and offered to pay all charges on them, if informed of the amount. M. completed the manufacture of the goods, and expended \$800 in finishing them, and sold them for \$3,193.50. A. sued M. in trover, for the conversion of the wool and yarns and goods. Held that it was not necessary for A. to prove an actual tender of an amount sufficient to cover the value of the work and materials supplied by O., but that the offer made to pay the charges was sufficient. Held, also, that A. was entitled to recover the avails of the goods, less the cost of the materials furnished by O. and by M. and the expense of manufacture: *Aborn v. Mason*, 14 Blatchf. Rep., 405.

1877

Ex parte Baker. In re Bellman.

C.A.

[4 Chancery Division, 795.]

C.A., March 8, 1877.

795] *Ex parte BAKER. In re BELLMAN.*Bill of Exchange—Notice of Dishonor—Bankruptcy of Drawer—Appointment of Trustee—Proof.*

It is sufficient for the holder of a dishonored bill of exchange to give notice of dishonor to the drawer himself, even though before the dishonor he has been adjudicated a bankrupt, and a trustee of his property has been appointed.

The holder of a bill of exchange which was dishonored after the appointment of a trustee in the bankruptcy of the drawer sent notice of the dishonor to the drawer by post to an address which he had left for some months :

Held, that, that address being the only one with which the holder was acquainted, the notice was sufficient.

The holder was, therefore, allowed to prove in the bankruptcy in respect of the bill.

THIS was an appeal from a decision of Mr. Registrar Pepys, sitting as Chief Judge in Bankruptcy.

796] *E. E. Bellman filed a liquidation petition on the 9th of December, 1874. The creditors resolved to accept a composition, but registration of the resolution was refused, and on the 11th of March, 1875, Bellman was adjudicated a bankrupt. On the 6th of April, J. W. Baker was appointed trustee.

Bellman had carried on business as a brewer in partnership with W. A. Pooley at the Oak Brewery, Canning Town, as Bellman & Co. In August, 1874, Bellman sold his interest to C. T. Jones. Jones afterwards sold his interest to Pooley, and in December, 1874, Pooley sold the whole of the business to C. D. Hay.

The liquidator of the City and County Bank, Limited, tendered a proof in the bankruptcy upon seven bills of exchange for £1,000 each, dated the 12th of December, 1874, and drawn by Bellman as Bellman & Co. upon and accepted by Hay. The bank had discounted the bills. The bills became due on the 15th of April, 1875, but were dishonored. On the 16th of April notice of the dishonor was given by the bank by means of a letter signed by the manager, and sent by post addressed to Bellman & Co., at the Oak Brewery. At this time the manager of the bank did not know of the appointment of the trustee. The appointment was gazetted on the 20th of April, and formal notice of it was sent to the bank on the 22d of April. The Oak Brewery was entered in the books of the bank as the address of Bellman & Co., and they knew of no other address. Bellman

had, in fact, never been at the brewery since he had parted with his interest in it.

The trustee rejected the proof. The registrar ordered it to be admitted. The trustee appealed.

De Gex, Q.C., and *R. Vaughan Williams*, for the trustee: There is no sufficient proof that notice of dishonor was given to Bellman. He had nothing to do with the brewery at that time.

Moreover, the notice ought to have been sent to the trustee. Even before the present Bankruptcy Act, there are *dicta* to show that, after the appointment of an assignee in bankruptcy of a person liable upon a bill of exchange, notice of dishonor ought to have been given to the assignee: *Ex parte Moline* ⁽¹⁾; *Ex parte Johnson* ⁽²⁾; *Ex parte Chapel* ⁽³⁾; Byles on Bills ⁽⁴⁾. And *now, under the [797 present law, the bankrupt after the adjudication is not personally liable on the bill; the only right of the holder is to prove against the estate. The trustee alone is interested in the matter, and notice of dishonor ought to be given to him. The theory is, that the acceptor may have assets of the drawer in his hands, but if the drawer is bankrupt those assets form part of the estate.

[MELLISH, L.J.: The drawer himself might take up the bill and then proceed against the acceptor. It would be a breach of trust for a trustee in bankruptcy to do that.

BAGGALLAY, J.A., referred to *Rohde v. Proctor* ⁽⁵⁾.]

There must be a reasonable notice of dishonor. If the bill holder did not know of the bankruptcy, notice to the bankrupt would be reasonable, but not when the holder was aware of the bankruptcy.

Roxburgh, Q.C., and *Finlay Knight*, for the liquidator, were not called upon.

JAMES, L.J.: No case has been cited to us in which it has been actually decided that notice of dishonor must be given to the assignees of a bankrupt drawer of a bill of exchange.

Apparently, there are two or three *dicta* which seem to imply that, and it is said in Mr. Justice Byles' book that "perhaps the notice ought to be given to the assignees." That is the utmost. It is very odd, considering the thousands (I may say millions) of bills of exchange which must have been the subject of proof in this country, that there never has been a decision that the holder of a dishonored

⁽¹⁾ 19 Ves., 216.

⁽²⁾ 3 Dea. & Ch., 488.

⁽³⁾ 3 Mont. & A., 490.

⁽⁴⁾ 12th ed., p. 292.

⁽⁵⁾ 4 B. & C., 517.

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Ex parte Baker. In re Bellman.

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bill of exchange must give notice of dishonor to the assignees of the bankrupt drawer to entitle him to prove against the estate. The absence of any decision of that kind goes very far indeed to show that that has never been supposed to be the law. What we have to consider is, whether we ought now, by reason of the change in the bankruptcy law, to lay down for the first time that the notice must be given to the 798] trustee. I *think that the present case shows how monstrously hard and unjust any such rule would be. Here is a joint stock bank which receives in the course of its business a bill with three or four names upon it. The acceptor does not honor the bill, and the officer of the bank has to give notice to the other persons liable. He gives notice at the business addresses or the residence addresses of the indorsers and the drawer whose names he finds upon the bill. Can it be said that the bank ought to keep a register of every one whose name is upon the bill, so that they may be able to say, "So and so became bankrupt the other day, and we must give notice to his trustee." It seems to me that would make the transaction of business of this kind very difficult and inconvenient, and would be most unreasonable. It does not appear to me that any good reason can be suggested why the holder of a bill should give notice of dishonor to any one but the persons whose names he finds upon the bill. Therefore I think this proof has been rightly admitted.

MELLISH, L.J.: I am of the same opinion. I agree that it has not hitherto been decided what is, under these particular circumstances, a sufficient notice of dishonor. The only rule is that there must be a reasonable notice of dishonor. The cases show that the circumstance that the drawer has become bankrupt is not a sufficient excuse for giving no notice of dishonor. Notice of dishonor must be given. The question is, must the notice, after the appointment of a trustee, be given to him or to the bankrupt, or may it be given to either of them? I agree with Lord Justice James that if we were to lay down the rule that the notice must be given to the trustee, we should be imposing a very great burden on persons who deal with bills in the ordinary course of business, and the consequence would be that many just proofs would be rendered impracticable. It would be constantly found that notice of dishonor had not been given to the proper persons. Of course a joint stock bank must have some officer or clerk whose duty it is to give the notice of dishonor. As soon as the bill has been presented and dishonored he refers to the bill to see who is

the drawer and who are the indorsers, and he finds out what their *addresses are and gives the notice at those [799 addresses. That is the ordinary course. But if we were to say that that is not sufficient, but that he ought to inquire as to each of those persons whether he has become bankrupt, and, if so, that he must find out who is his trustee and where he lives, we should impose a very great burden, and should be putting a great difficulty in the way of recovering just debts without any reason, because I do not believe the trustee would suffer any inconvenience or loss from the notice of dishonor being given to the bankrupt instead of to him. I think, also, that it was sufficient for the bank to send the notice to the Oak Brewery, because it was the only address they knew. The bills themselves were only dated "London." The bank had that address in their book, and they sent the notice there. I think that the appeal must be dismissed.

BAGGALLAY, J.A.: I am of the same opinion, and for the same reasons.

Solicitors for trustee: *Harper, Broad & Battcock.*

Solicitors for liquidator: *Janson, Cobb & Pearson.*

[4 Chancery Division, 800.]

M.R., Dec. 9, 1876.

*CHAPMAN V. CHAPMAN.

[800

[1876 C. 308.]

Will—"Money, Cattle, Farming Implements, &c."—*Ejusdem generis*—*Blank Gift*—*General Residuary Gift*.

A testator directed his freehold estate to be sold, and his debts to be paid by his widow, his sole executrix. He then bequeathed to her, "all my money, cattle, farming implements, &c., she paying my brother J. C. the sum of , and my brother L. C. the sum of ".

Held, that the widow was entitled to the whole of the testator's property after payment of his debts, and funeral and testamentary expenses.

THOMAS CHAPMAN, yeoman, who died in February, 1876, made his will on the 14th of October, 1875, as follows:—

"I, Thomas Chapman, do wish to write my last will and testament.

"I direct that my estate called Bark House be sold after my decease, and all my just debts be paid by my wife Lydia Chapman, the sole executrix of my will.

"To her I leave all my money, cattle, farming implements, &c., she paying my brother James Chapman the

sum of to him or his heirs: to my brother Lawrence Chapman the sum of to him or his heirs."

The testator's real estate at the time of his death consisted of a farm, partly freehold and partly customary freehold, called Bark House Farm. His personal estate, consisting of cash, farming live and dead stock and furniture, was insufficient for payment of his debts and funeral and testamentary expenses.

This was a special case filed by the testator's widow, Lydia Chapman, against his brother and heir-at-law, James Chapman, to obtain the opinion of the court upon the construction of the will; the only question calling for a report being, whether the farming live and dead stock and furniture of the testator, and the surplus proceeds of the sale of the Bark House Farm, after payment of his debts and funeral and testamentary expenses, were comprised in the gift to his widow.

801] **Chitty*, Q.C., and *Caldecott*, for the plaintiff: We submit that the expression "&c." is equivalent to "all my other property," and is therefore sufficient to pass the whole of the general residue. In *Hodgson v. Jex* ⁽¹⁾ your Lordship held that a gift of "all my furniture, plate, linen, and other effects" passed the whole of the residuary personal estate, and that the enumeration of different items before the words "and other effects" did not cut down the natural meaning of those words.

Bagshawe, Q.C., and *W. Barber*, for the defendant: The expression "&c." is not sufficient to pass the general residue; it must be confined to things *ejusdem generis*, its meaning being "and all other things like the preceding": *Newman v. Newman* ⁽²⁾; *Barnaby v. Tassell* ⁽³⁾; *Jarman on Wills* ⁽⁴⁾.

JESSEL, M.R.: I am of opinion that this testator has not died intestate as to any portion of his property, but has effectually given all his property to his wife. After directing his Bark House estate to be sold, he directs that his debts shall be paid by his wife. How is she to pay them? If she is to pay them out of his property, then plainly she must take his property. Looking at the whole of the will, what the testator means is that she is to take everything he has in the world, she paying his debts and legacies. He has apparently made his own will, and though the words he has used are not artistic, still I think they lead to only one

⁽¹⁾ 2 Ch. D., 122.

⁽²⁾ 26 Beav., 220.

⁽³⁾ Law Rep., 11 Eq., 363.

⁽⁴⁾ 3d ed., vol. i, p. 721, n.

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possible conclusion, namely, that he intended to make his wife his universal residuary legatee, and I so decide.

Solicitor for plaintiff: *R. T. Jarvis*, agent for J. R. Picard, Kirkby Lonsdale.

Solicitors for defendant: *Ridsdale, Craddock & Ridsdale*, agents for W. Hartley, Settle.

[4 Chancery Division, 802.]

M.R., Dec. 16, 18, 1876.

***In re COOPER AND ALLEN'S CONTRACT FOR SALE TO [802 HARLECH.**

[1876 C. 366.]

Vendor and Purchaser—Mortgagee's Power of Sale—Trustes and Cestui que Trust—Selling Trust Property with other Property—Apportionment of Purchase-money—Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 2, 14, 15, 20, 33, 38—Mortgages of Life Estate and Remainder before Act, and sale by Mortgagees after—Mortgagee Agent for Mortgagor—"Succession"—Liability to Duty—"New Succession" created by Purchaser—"Alienation not conferring new Succession"—Duty payable on last Succession—Double Duty—Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 9.

In 1831, under the will and upon the death of a testator, his nephew A. became tenant for life, and A.'s eldest son, B., tenant in tail of a freehold estate, subject to an outstanding legal mortgage in fee. In 1849 A. mortgaged his equitable life estate to certain persons, and in 1852, B., having previously barred his equitable estate tail, mortgaged his equitable remainder in fee to the same persons, each mortgage being for a distinct sum, and containing the usual power of sale. Various transfers of the mortgages from father and son took place, in the course of which, subsequently to the passing of the Succession Duty Act, 1853, the outstanding legal estate was got in. In 1863, the then mortgagees, in exercise of their powers of sale, sold the entire estate by auction to C. in fee for a lump sum, but in the conveyance to C. it was recited (as the fact was) that the purchase-money had been duly apportioned between the life estate and remainder. C. then died, having by his will devised the estate to his nephew D. for life with remainders over, whereupon D. entered into possession and paid duty on his succession to his uncle at 3 per cent. to the full amount as on the fee simple.

The trustees of C.'s will then sold the estate to a purchaser, who raised the objection that although the sale to C. was made under powers contained in mortgages existing before the passing of the act, succession duty had nevertheless attached, and would become payable in respect of B.'s succession upon the death of A., who was still living:

Held, upon a summons taken out by the vendors under sect. 9 of the Vendor and Purchaser Act, 1874,—First: That the mortgages of the life estate and remainder, though made to the same persons, were in all respects independent mortgages, and at the passing of the Succession Duty Act were not merged either at law or in equity; that the sale by the mortgagees under their powers in 1863 was to be regarded as a joint sale of the two interests, and could be supported only upon the principles applicable to joint sales of two trust properties by two sets of trustees; and that accordingly, inasmuch as a higher price was clearly obtainable by selling the fee simple in possession rather than the life estate and remainder separately, and as the purchase-money had been duly apportioned between the two [803 interests, the sale was a proper exercise of the powers:

Secondly: That at the date of the Succession Duty Act A. and B. were respect-

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ively entitled in equity as tenant for life and remainderman in fee, subject only to money charges on their respective estates, and therefore that B. was then entitled to a "succession" within sect. 2 of the act; and that since the mortgagees sold, in effect, as the agents of A. and B., C., as purchaser from them, took B.'s succession by "alienation not conferring a new succession" within sect. 15, and became liable to duty accordingly: but

Thirdly: That, as a "new succession" had been created by C., duty then became payable on that succession only, and therefore, the full amount having been paid by D. on his taking under such new succession, the estate was discharged from all further duty on A.'s death.

It is the duty of trustees who, having a trust or power to sell the trust property, join with the owner of another property in selling both properties together, first, to see that such a mode of sale is beneficial to their *cestuis que trust*; secondly, to see that their share of the purchase-money is apportioned before the completion of the purchase, and to obtain payment of such apportioned share; and thirdly, to apportion the share themselves, taking care to act under proper advice.

The proper mode of apportioning the prices of a life estate and reversion when sold together for a lump sum, is to value both interests separately, and not to put a value on one and deduct that from the total price.

The circumstances under which trustees of one property may join with the owner of another in selling both properties together, considered.

Observations on *Rede v. Oakes* (1).

Morris v. Debenham (2) approved of.

"By alienation or by any title not conferring a new succession," in sect. 15 of the Succession Duty Act, 1853, means, "either by alienation or by any title other than alienation, in both cases not conferring a new succession."

Settlement after the Succession Duty Act: A. tenant for life; B. remainderman in fee. A. and B. convey their estates for money to C. in fee. C. dies, having devised to D. in fee. D. pays duty on his succession from C., and then sells: On A.'s death no more succession duty will be payable than has already been paid by D.

(1) 4 D. J. & S., 505.

(2) 2 Ch. D., 540.

[4 Chancery Division, 827.]

M.R., Jan. 15, 1877.

827] *In re EBBW VALE STEEL, IRON AND COAL COMPANY.

Limited Company—Reduction of Capital and Shares—Loss of Part of Paid-up Capital—Writing off Loss—Petition—Jurisdiction—Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 9–15.

The nominal capital of a limited company was divided into shares of £32 each, all of which were subscribed for. On all the shares (except a few which were paid up in full) £29 per share was paid, leaving £3 per share to be called up. The capital having been partially lost through the depreciation of the property which represented it, the company desired to write off the loss, and for that purpose proceeded to take steps under the Companies Act, 1867, for reducing their nominal capital. They accordingly passed a resolution that the nominal capital should be reduced to a specified amount, and that each £32 share should be reduced to £23 by the extinction of £9 per share, to the intent that the existing liability of £3 per share on all the shares, except those fully paid up, should be preserved. They then
828] *presented a petition for an order for confirming the resolution, the minute required by sect. 15 of the act stating that the amount of the reduced capital was divided into shares of £23 each (instead of the original £32), on all of which (except the fully paid-up shares) the sum of £20, and no more, was to be deemed to have been paid up:

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Held, upon an application by the company, by summons, for liberty to proceed with the petition,

That the court had no jurisdiction to sanction the proposed reduction of capital, inasmuch as the act contained no provision for enabling a company whose paid-up share capital had been partially lost, as in the present instance, to write off that loss by reducing the nominal amount of each share.

THE Ebbw Vale Steel, Iron and Coal Company, Limited, was registered on the 15th of April, 1868, with a memorandum and articles of association, and having a nominal capital of £2,383,200, divided into 74,475 shares of £32 each. The company commenced its business shortly after its registration, and had carried it on without interruption since. The property of the company consisted of numerous iron and coal mines, and tracts of land in various counties, and their business—which was that of iron and coal miners, and iron and steel manufacturers—was carried on upon a very extensive scale. The whole of the shares were subscribed for and duly allotted, and £29 per share was paid up, leaving £3 per share to be called up, except as to 515 shares, which were paid up in full.

In June, 1876, the annual meeting of the company was held, at which, in consequence of the depreciation of the company's property through the great fall which had then taken place in the value of iron and coal, a committee of shareholders was appointed to investigate the financial position of the company.

In August, 1876, the committee made their report, in which they recommended that the amount of capital lost through the depreciation of the company's property should be written off in the following manner, viz., by reducing the nominal share of £32 to £23, and reducing the sum paid upon each share from £29 to £20, thus leaving the existing liability of £3 per share remaining.

In order to carry out this recommendation, the company proceeded to take the steps required by the Companies Act, 1867, for effecting a reduction of capital, and accordingly, on the 17th of November, 1876, held an extraordinary general meeting, and *passed a resolution directing [829 the insertion in the articles of association of an additional article authorizing the company "from time to time to reduce the amount of its capital or consolidate or subdivide the same into shares of a larger or smaller denomination."

At another extraordinary general meeting of the company held on the 6th of December, 1876, this resolution was duly confirmed, thus becoming a special resolution, and the following further resolution was then passed: "That the

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nominal capital of the company be reduced from £2,383,200, being 74,475 shares of £32 each, to £1,712,925 divided into 74,475 shares of £23 each, by the extinction on each of the said 74,475 shares of paid-up capital to the extent of £9, to the intent that the present liability of £3 per share on each of the said 74,475 (except the 515 fully paid-up shares) shall be preserved notwithstanding such reduction."

The last-mentioned resolution was duly confirmed at another extraordinary general meeting on the 22d of December, 1876, and thereby became a special resolution.

The company then presented a petition under sect. 11 of the Companies Act, 1867, praying the court to approve this last resolution and to fix a date at which the addition to the name of the company of the words "and reduced" might be discontinued.

The usual application was then made by the company, by summons in chambers, for liberty to proceed with the petition, whereupon, in order to save the expense—which might possibly be useless—of settling a list of creditors and issuing notices and advertisements under the General Orders of March, 1868, his Lordship directed the summons to be immediately adjourned into court for argument upon the preliminary question whether the court had power, under the act of 1867, to sanction a reduction of paid-up capital.

The question now came on for argument accordingly.

The minute submitted for the approval of the court, as required by the 15th section, was in the following form: "The capital of the company is £1,712,925, divided into 74,475 shares of £23 each, on all of which shares (except 515, numbered as follows . . . which are fully paid up) the sum of £20, and no more, is to be deemed to have been paid up."

830] **Fry, Q.C., and Charles McLaren*, in support of the summons: Our case is simply this: We have lost a portion of our capital, and we desire to do what a private firm would do under the same circumstances, namely, to write off the portion lost, and go on trading with the diminished capital, and declare dividends on that capital only. We submit that this can be done by a limited company under the provisions of the Companies Act, 1867, contained more especially in the following sections: The 9th section (') empowers a limited company to reduce its capital, if

(') Sect. 9 is as follows: "Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorized so to do by its regulations as originally framed or as

authorized so to do by its articles as altered by special resolution, which has been done here. Then sect. 11 requires the reduction to be confirmed by an order of the court upon petition. Sect. 15 provides for the registration of the order and also of a minute (to be approved by the court) stating the amount of the reduced capital, the number of the shares, and the amount of each share. Then sect. 16 (*) provides that the minute shall form part of the memorandum of association, and further, that no member of the company "shall be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount which has been paid on such share and the amount of the share as fixed by the minute." We admit that at first sight this latter part of the section seems to point to unpaid-up capital in respect of which there is an existing liability, and it is no doubt the section which mainly gives rise to the difficulty in this case. But we submit that, in the absence of an express enactment to [831] the contrary, the section may be held to refer to capital generally, whether paid up or not. If the proposed minute be adopted, it becomes, under that section, virtually part of the original memorandum of association, and persons would be estopped from alleging that more than £20 had been paid up.

[JESSEL, M.R.: You do not "reduce" capital which has been already paid up and exhausted.]

You reduce the nominal capital—the word "capital" in sect. 9 meaning "nominal capital"—and then substitute, under sect. 16, the reduced nominal capital for the amount specified in the original memorandum of association. The 16th section thus gives the measure of liability. A power to reduce capital and shares was not included in sect. 12 of the Companies Act, 1862, but that section empowered a company to convert its paid-up shares into stock; that, however, is not desired in the present case.

altered by special resolution, as to reduce its capital: but no such resolution for reducing the capital of any company shall come into operation until an order of the court is registered by the Registrar of Joint Stock Companies, as is hereinafter mentioned."

(*) Sect. 16 is as follows: "The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of association of the company, and shall be of the

same validity and subject to the same alterations as if it had been originally contained in the memorandum of association; and, subject as in this act mentioned, no member of the company, whether past or present, shall be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount which has been paid on such share and the amount of the share as fixed by the minute."

[They mentioned *In re Crédit Foncier of England* (¹), in which Vice-Chancellor Bacon sanctioned a reduction of capital where all the shares had been fully paid up.]

JESSEL, M.R., mentioned *In re Financial Corporation* (²), where the subdivision of existing shares into shares of a smaller amount was held invalid.

JESSEL, M.R.: I am very sorry that I cannot accede to this application, which is a most reasonable one, and I have no doubt that if the Legislature amends the act of Parliament some provision will be made for enabling the court to do that which I think it cannot do at present.

When a joint stock company has lost a portion of its capital, nothing can be more beneficial to the company than to admit that loss—to write it off—and, if it chooses to go on trading, to trade with the diminished capital which remains, the dividend being declared on the capital actually remaining. The object of the present application is to authorize this to be done: that is, a portion of the share capital having been lost, it is desired that *something should be written off each share so as to make the share of less nominal value, and to enable the company—still going on trading—to pay a dividend on the amount of the capital actually remaining; but, as I understand the Companies Act, 1867, such was not the object of the act.

The object of the act was to enable companies which had started with a larger nominal capital than they wanted, and therefore had imposed on their shareholders a liability to pay a much larger sum in the shape of calls than was required, or could fairly be required, for the business of the company, to relieve the shareholders from a portion of that liability, and I think it had no other object. The 9th section says that any company limited by shares may so far modify the conditions contained in the memorandum of association as to “reduce its capital.” Now, first of all, what does “reduce its capital” mean, standing alone? I should think it meant an actual reduction. This is not an actual reduction, because the capital has been lost. It is merely acknowledging that to be lost which is lost. £9 per share is lost: £3 per share remains to be paid up, and the company wish that £3 to be still called up. All they want is to write off £9 per share as loss. That is not a reduction of capital: part of the capital has gone already; it has been reduced by a very unpleasant process. It requires no resolution of the company to do that. It wants to express that a portion of the capital has been lost. To my mind that is

(¹) Law Rep., 11 Eq., 356.

(²) Law Rep., 2 Ch., 714.

not the meaning of the act of Parliament. Then the 10th section is, "The company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the court may fix, the words 'and reduced,' as the last words in its name; and those words shall, until such date, be deemed to be part of the name of the company within the meaning of the principal act."

Now what is the meaning of that? It means that the company is to give notice to the world that it is a company which previously offered to the public the security of a larger amount of nominal capital, that is, of a larger amount of liability on the part of the shareholders, than it offers now. Surely that never could have been intended to apply to a company which offers exactly the same security to the persons who may trust it in *future as it did before, [833 because this company will continue to offer the security of all the capital it has and all it can get, and therefore there can be no difference. It is unnecessary to add another word on the 10th section.

Then the 11th section is merely formal. The 12th section is also immaterial.

Then the 13th section is this—and it is a very important section—"Where a company proposes to reduce its capital, every creditor of the company who at the date fixed by the court is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, shall be entitled to object to the proposed reduction, and to be entered in the list of creditors who are so entitled to object." Of course, if you are reducing the liability of shareholders—that is, of those who contribute to the payment of debts—it is quite reasonable that the actual existing creditors should be allowed to object to such a proceeding; but when you are doing nothing of the kind—when, at the time you are proposing to effect the nominal reduction, you are leaving the actual existing creditors with every remedy they previously possessed, it surely would be monstrous that a creditor should be allowed to object to that with which he has no concern. It is utterly immaterial to the actual creditors whether or not you reduce the nominal capital of the company. They have all the existing assets of the company, and they have all the existing liabilities to fall back upon. Therefore, as I said before, it is unreasonable to suppose that the creditors would be entitled to take such a proceeding as that; and it would be still more unreasonable

for the court to go through the expensive and troublesome process of settling a list of such creditors. It seems to me, therefore, that the 13th section confirms the view that I take as to the meaning of the act.

Then the 14th section says: "Where a creditor whose name is entered on the list of creditors, and whose debt or claim is not discharged or determined, does not consent to the proposed reduction, the court may (if it think fit) dispense with such consent on the company securing the payment of the debt or claim of such creditor by setting apart 834] and appropriating, in such manner as the *court may direct, a sum of such amount as is hereinafter mentioned :'" it is a long section, and I will not read the whole of it. So that if a creditor does not consent, you can only go on with the arrangement by securing his debt. There, again, I say that it would be unreasonable to apply that section to such a case as this.

The 15th section merely directs a registration, but it does throw a little light upon the matter too, for it says that the minute shall be given to the Registrar of Joint Stock Companies, and that he shall register it.

Then the 16th section, which is a very important section, is as follows: [His Lordship read it.] That section is perfectly intelligible if you assume it to refer—as I do assume it to refer—to a reduction of actual capital, that is, a reduction of liability; as, for instance, supposing the shares were £20, and you reduced them to £10, and there was £10 paid up, there would in that case be no more to pay. Therefore the object of the section was to prevent the liability of the shareholders existing to the original amount; but it would have no meaning at all where you are taking away paid-up capital and allowing the liability to remain, because it says the liability is not to remain. A person is only to be liable for the difference in the amount which has been paid on such share, and the amount of the share as fixed by the minute. But here the company attempt to get over that by saying that the sum of £20, and no more, is to be deemed to be paid up. The act of Parliament does not allow you to get rid of the section in that way. It is not what is deemed to be paid up, but what—as the 16th section expressly says—has been paid up; and that is the pinch of the case, if I may say so. Some ingenuity has been applied to this section, first, by putting that in the minute which is not true, and then by saying that the shareholders are to be estopped by the memorandum as altered from asserting that more has been paid up; but it is forgotten that it is only by

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the 16th section that the minute is made part of the memorandum, and that it is only made part of it upon terms mentioned in the 16th section, namely, that the shareholders shall only be liable for the difference between the amount actually paid up and the nominal amount fixed by the minute.

*The result therefore is, that in my opinion the [835 act of Parliament does not apply to the case in question, and that the summons must be discharged.

Solicitors: *Ashurst, Morris & Co.*

[4 Chancery Division, 835.]

M.R., Feb. 2, 1877.

**Ex parte* JARMAN.

Solicitor and Client—Order for Taxation—Lien on Papers for further Costs—Attorneys and Solicitors Act (6 & 7 Vict. c. 78), s. 38.

In making an order for taxation under the Attorneys and Solicitors Act (6 & 7 Vict. c. 78), s. 38, it is discretionary with the court whether or not to add the order for the delivery up of papers.

A solicitor delivered to his client a bill of costs incurred in pending suits in which he afterwards, with his client's knowledge, incurred further costs. While the suits were still pending the client obtained an order of course for taxation and delivery up of papers, whereupon the client delivered a bill for the further costs. On a motion to discharge the order on the ground that the solicitor had a lien on the papers for the further costs:

Held, that the order should be amended so as to include both bills.

Seem, the proper form of order in such a case would be a simple order for taxation, without ordering the papers to be delivered up.

In re Teague (!) disapproved.

(!) 11 Beav., 318.

[4 Chancery Division, 841.]

M.R., Feb. 17, 1877.

**In re* REEVE'S TRUST.

[841]

Will—Legacy to Executor—Costs of Administration—Residue.

Bequest of £100, after the death of tenant for life, to P., who was named as one of the trustees and executors, but renounced and disclaimed:

Held, that the presumption that it was given to him in his character of executor was rebutted by the fact of its being payable after the death of the tenant for life, and that he was entitled to the legacy.

Where there is a gift of residue to be divided among certain persons and classes of persons, the costs of ascertaining of whom such classes consist are payable out of the whole residue before the same is divided.

MARTHA REEVE, by her will, dated the 25th of October, 1860, gave an immediate legacy to one of her residuary legatees, which was to be considered on account of his por-

tion thereafter bequeathed; and she bequeathed all the residue of her personal estate to James Flack and George Pamphilon upon trust to pay the annual produce to Martha Flack for her life, and after her decease, upon trust (after payment thereof of a legacy of £100 to the said George Pamphilon) to divide the principal of the said trust fund into two equal moieties; and, as to one moiety, she bequeathed the same as follows: one half thereof to Samuel Reeve, and in the event of his decease, to his wife and children equally, and the other half in equal shares to J. R. Burgess, J. W. S. Burgess, and Martha Burgess; and, as to the other moiety, upon trust to divide the same into five equal portions, namely, one portion to the children of Mary Snow in equal shares; one portion to the children of John Sawkins in equal shares; one portion to Susan Adams, and, in case of her death in the testatrix's lifetime, then to Susan Wallis and Mary Ann Mason in equal shares; one portion to the children of Thomas Sawkins, and the remaining portion to James Sawkins, and, in the event of his death in the testatrix's lifetime, to Eliza Chipperfield, or, in the event of her decease, to her children equally; and if any of the objects of the foregoing bequests should die leaving issue, then such issue were to take their parent's share. The testatrix appointed the said James Flack and George Pamphilon executors of her will.

The testatrix died in 1861, and the will was proved by 842] James *Flack. George Pamphilon did not act as executor, but renounced and disclaimed the trusts of the will.

Martha Flack, the tenant for life, died in 1875.

James Flack, the sole acting trustee and executor of the will, died in 1868, and his personal representative paid into court, under the Trustee Relief Act, the sum of £1,931 10s. 11d., being the net residuary estate of the testatrix after deducting the expenses of converting the fund and paying the same into court.

The petition was presented by the persons entitled to two tenth parts of the residue under the will of the testatrix, praying that the same might be paid to them respectively, and that the rights and interests of all other persons to the remaining eight tenth parts of the residue might be ascertained, and that such parts might be distributed and paid accordingly. There had been inquiries in chambers to ascertain who were the persons now entitled to the portions given in trust for the children of Mary Snow, the children of John Sawkins, and the children of Thomas Sawkins, respectively.

Two questions now arose on the petition: first, whether George Pamphilon was entitled to his legacy of £100, he having renounced and disclaimed; and, secondly, whether the costs of ascertaining the classes of persons entitled were to be deducted from the whole fund before it was distributed, or from the shares to which the several classes were entitled.

Chitty, Q.C., *Rigby*, and *Eaden*, for the petitioners.

Marten, Q.C., *Caldecott*, and *Gardiner*, for the other persons beneficially interested.

R. H. Cole, for the representative of James Flack.

On the first question the case of *Jewis v. Lawrence* (*) was referred to, where a testator gave a leasehold house to William Lawrence, describing him as "one of my trustees and executors," and gave a legacy of £100 to J. T. Paul, whom he also described as "one of my trustees and executors." Paul died without having proved the will, but without having disclaimed or renounced: it was held that his executors were entitled to the legacy, the inequality *in [843 the subject-matter of the two gifts being deemed sufficient to rebut the presumption that the legacy was given to Paul in his character of executor.

JESSEL, M.R.: I think that George Pamphilon is entitled to this legacy. The fact of the legacy having been given to him after the death of the tenant for life appears to me to rebut the presumption that it was given to him in his character of executor.

On the second question,

Chitty, Q.C., submitted that the costs necessarily incurred in the inquiries for ascertaining the several classes entitled under the will were costs of administration, and, as such, they must be paid out of the whole fund before the residue was divided: *Eyre v. Marsden* (*); *Shuttleworth v. Howarth* (*); *Holgate v. Haworth* (*); *Gravatt v. Tann* (*); *Trethewy v. Helyar* (*).

Davey, Q.C. (*amicus curiæ*), referred to *Boulton v. Beard* (*).

JESSEL, M.R.: The question I have to decide is as to the incidence of the costs of proving the pedigrees of various persons who are entitled to share in the residue of this estate.

The residue is given in shares, some of which are given to certain persons by name, who of course are entitled to their definite aliquot shares. Other shares are given to classes of

(*) Law Rep., 8 Eq., 345.

(*) 4 My. & Cr., 231.

(*) Cr. & Ph., 228.

(*) 17 Beav., 259.

(*) Law Rep., 7 Eq., 436.

(*) *Ante*, p. 63.

(*) 3 D. M. & G., 608.

persons who have to be ascertained. To satisfy the court as to who are the members of these classes, the requisite evidence of pedigree must be given, which of course occasions considerable expense. In this particular case it was absolutely necessary to pay the whole of the residue into court, because there was a question of construction to be decided which might possibly have affected the gift to the persons named; so the propriety, if I may say so, of instituting an administration suit could not have been questioned. There was a payment into court of the whole fund under 844] the Trustee Relief *Act; and, therefore, it devolved upon the court to administer it, and to ascertain the titles.

It is clear from the case which Mr. Davey referred me to, of *Boulton v. Beard*(¹), that where a will gives aliquot shares to certain persons by name, and gives other aliquot shares in settlement, and a question of construction arises on the settlement, the whole of the costs of deciding that question of construction (which may be the only reason for instituting the suit) will be thrown, not on the settled share, as to which only the question of construction arose, but on the whole of the residue, on the principle that they are administration costs, and that the costs of construing a will, though they are only the costs of construing the will as respects only one share, must be paid out of the whole residue.

The same principle has long ago been established, that the costs of ascertaining the construction of a gift of a pecuniary legacy are costs of administration, and are thrown on the residue. Now, there can be no difference in principle between ascertaining the facts as to the pedigree of the persons entitled to aliquot shares, and ascertaining the construction of the gifts to those persons. The question of fact as much applies to the persons entitled to the aliquot shares as the question of law on the construction of the gift; and it appears to me there is no solid distinction that can be suggested.

The only case I can find is not exactly in point. But on principle I think the rule should be so. The principle is, that there is no residue until the entire costs of administration are paid. Now, what are the "entire costs of administration?" Surely they include the ascertaining, not only of the specific and pecuniary legatees, but of the residuary legatees also. You cannot administer an estate, that is, divide it properly, until you have found out all the parties who are entitled. Therefore it appears to me on principle, that the whole of the costs of ascertaining who those per-

(¹) 3 D. M. & G., 608.

sons are, are properly payable out of the estate which remains after paying the debts, funeral and testamentary expenses, and legacies; and that there is really no residue to be divided until you have paid all those costs. I shall therefore direct payment of all the costs so payable out of the residue.

Solicitors: *Cole & Jackson.*

[4 Chancery Division, 845.]

V.C.M., Jan. 16, 17, 22, 23, 24, 1877.

***ECCLESIASTICAL COMMISSIONERS FOR ENGLAND V. [845
NORTH EASTERN RAILWAY COMPANY.**

[1872 E. 39.]

Coal Mines—Breaking Bounds—Damage to adjoining Mine—Railway Company—Ultra Vires to work Mines—Implied Sanction by Act of Parliament—Statute of Limitations—Bar only from Discovery—Laches.

The plaintiffs, who were owners of a coal mine, claimed damages against the owners of an adjoining mine for having broken their barriers and worked their coal. The wrongful acts were committed in 1863 while the adjoining mine was being worked by the Hartlepool Railway Company. The boundaries of the two mines were settled by mutual agreement in 1862, and after some lengthy negotiations a release was executed in 1864, by which all previous wrongful acts were condoned and released on both sides. An act of Parliament was passed in 1863 by which the Hartlepool Railway Company were to sell their mines within five years; and in 1865 the said railway company was amalgamated with the defendant company, and all their assets and liabilities were transferred to them:

Held, first, that although it was *ultra vires* of the railway company to work mines, the act of 1863 implied that the company were to have power to work their mines until the mines were sold, and that upon the amalgamation with the defendant company the latter became liable for the wrongful acts of their predecessors:

Secondly, that the wrongful acts committed in 1863 were not condoned by the release of 1864, the plaintiffs having had no ground for suspecting that while the release was in negotiation the previous settlement of boundaries had been broken:

And, thirdly, that the Statute of Limitations only commenced to run from the time of the discovery of the wrongful acts, there being no laches attributable to the plaintiffs for not having discovered the damage prior to 1870, two years before the filing of the bill.

THIS was a bill filed on the 20th of June, 1872, by the Ecclesiastical Commissioners for England and their present lessees, Messrs. Stobart & Morton, against the North Eastern Railway Company, for an account of all coals and other minerals worked by the West Hartlepool Harbor and Railway Company, before that company was transferred to the North Eastern Railway Company, from a colliery of the plaintiffs in the county of Durham called the Newton Cap Colliery; and of the coal which the company had rendered unworkable, without any allowance for the cost of working *such coal; and for payment of the amount due on [846

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taking such account; and to ascertain the damages sustained by the plaintiffs by reason of the West Hartlepool Company having broken through the boundary between the Newton Cap Colliery and the defendants' colliery, called the Hunwick Colliery.

The following were the facts of the case:—

The bishop of Durham had very extensive estates in the county of Durham. These estates had now become vested by act of Parliament in the Ecclesiastical Commissioners for England. The colliery owned by the commissioners was called the Newton Cap Colliery, and the colliery held by the West Hartlepool Company, which adjoined it, was called the Hunwick Colliery. In 1846 the Newton Cap Colliery was demised by the then bishop of Durham, by a lease dated the 31st of December, 1846, to the predecessors in title of the co-plaintiffs, Messrs. Stobart & Morton, for three lives, two of which were still in existence. The lease contained the usual covenant that a barrier of forty yards should be left between it and the adjoining colliery, and a similar covenant was contained in the lease of the Hunwick Colliery. The Hunwick Colliery belonged to Mr. Matthew Bell, and was leased by him on the 8th of September, 1856, to Messrs. Jackson & Hodgson, and Jackson became afterwards solely entitled to the colliery, and he assigned it to himself and Messrs. Watson & Wood, as trustees for the West Hartlepool Company. Under these circumstances, Messrs. Stobart & Morton were lessees of the Newton Cap Colliery, and the West Hartlepool Company were lessees of the Hunwick Colliery. Both of them were large collieries, one of them being capable of working 600 tons of coal a day, and the other 500 tons.

In 1862 questions arose as to the boundaries of these two collieries, and it was then ascertained that some part of the Newton Cap Colliery was in point of fact described on the Hunwick Colliery plan as being within the bounds of that colliery. This led to investigation, and through the instrumentality of Mr. W. S. Stobart, whose father was a partner in the Newton Cap Colliery, it was ascertained that certain land which undoubtedly belonged to the Newton Cap Colliery was described as being within the bounds of the adjoining colliery. In consequence of this Mr. Johnson, who had been for many years the surveyor, manager and principal agent of the West Hartlepool Company, and also Mr. Bell, the lessor of the Hunwick Colliery, investigated the matter, and the result was that a new map, accurately describing the boundaries, was drawn up, and it was

then ascertained that there were three properties, namely, Councillor's Copyhold, Ward's Leasehold, and part of Hunwick Lane, which had been described as being within the bounds of the defendants' colliery, when in point of fact they belonged to the plaintiffs' or Newton Cap Colliery. This having been set right by the new map, it was considered that at that time, namely, in 1862, all questions between the parties were, as far as any disputes had arisen as to the boundaries and as to the working into each other's properties, settled; and, according to the evidence, it appeared that up to that time no coal belonging to the owners of the Newton Cap Colliery had been actually worked or removed by the defendants.

After this a long correspondence took place between the parties, ending in May, 1864, the result of which was that an agreement was executed, dated the 11th of May, 1864, between a Mr. Armstrong, as representing the West Hartlepool Company, and Mr. Stobart, for himself and partners, under the name of the North Bitchborn Coal Company, providing for certain things to be done in respect of the collieries, and ending with this clause, "It is mutually agreed by and between the undersigned parties hereto, that in consideration of the above all claims on account of damage of every kind, and whether by trespass or otherwise by either party, be condoned and discharged from the signing of this agreement."

It further appeared that in 1863 an act of Parliament was passed for the purpose of conferring additional powers on the West Hartlepool Company and for regulating the debenture debt and capital of the company, and by the 51st section of that act it was provided: "Within five years after the passing of this act the company, or, as the case requires, the trustee for the company, to the extent of the estates, shares, rights, or interest of the company in all collieries in which the company now have any estates, shares, rights, or interests, may and shall sell and absolutely dispose of the same either by public auction or by private contract, and on such terms and conditions as the company shall think proper; and *the net moneys produced [848 by the sale and belonging to the company shall, so far as they extend, be applied only in paying off principal moneys then secured by debentures of the company, or in the redemption of Redeemable Class A Stock."

In 1864 the collieries in the occupation of the West Hartlepool Company, including the Hunwick Colliery, were sold to two gentlemen, named Lancaster and Brogden, for the

sum of £25,000, and the purchasers having paid a deposit of £5,000, entered into possession of the colliery on the 8th of August, 1864.

In 1865 an act of Parliament was passed for the amalgamation of the undertakings of the West Hartlepool Company and the Cleveland Railway Company with that of the North Eastern Company, and thereby the West Hartlepool Company was dissolved, and all the property, the benefits of contracts, and other interests belonging to the Hartlepool Company were transferred to the North Eastern Company, but subject to all existing contracts, debts, liabilities, engagements and obligations affecting the same respectively, and to the payment or discharge, performance or observance thereof by the latter company.

The alleged working of the plaintiffs' coal by the West Hartlepool Company was not discovered, according to the statements of the plaintiffs, until October, 1870, when, in the course of working their coal, they found that large quantities of coal had been taken away by the defendants, amounting in value to several thousand pounds.

A correspondence then ensued between the parties, and ultimately the plaintiffs, who alleged that they could not find out the mischief done earlier than October, 1870, instituted this suit.

A number of affidavits were filed on both sides, and some of the witnesses were cross-examined. The result of the evidence was this: Gardner, the overseer of the Hunwick Colliery, stated that, under a mistaken view that Councilor's Copyhold and the other lands were included in the demise to the defendants, he had, in 1863, directed Dixon, the overman of Hunwick, to work directly into Councilor's Copyhold. Dixon stated positively that no coal had been worked from Councilor's Copyhold prior to 1863, and he proved by the yard book or books showing the daily workings of the colliery, that in the month of January, 1863, he [849] commenced *working under this property—that he worked all the pillars as well as the walls, and left all such part in goaf, that is, completely worked out, so as to let the surface down, and that the whole of the coal was so worked out before the beginning of the year 1864. There was also evidence to prove the nature of the damage which the plaintiffs would suffer upon the termination of the defendants' lease by means of the flow of water from a river close by, in consequence of the barriers between the two collieries having been destroyed by the defendants.

Glasse, Q.C., Hastings, Q.C., and Borrett, for the plain-

tiffs: The wrongful act by which our coal was worked and taken away and our barriers broken down was committed, according to the evidence, in the year 1863, and this having been more than six years before the filing of the bill, we should have no remedy at law, but must come to equity, on the ground of concealed fraud. This course was pointed out in *Hunter v. Gibbons* (') and in *Bonomi v. Backhouse* (*).

If we had the Hartlepool Company here we should have been entitled, as against them, to a return of the profits made by the sale of this coal which has been taken by us, but the Hartlepool Company was dissolved, and all the property and assets of the company were transferred to the defendants—the amalgamated company—under the act of 1865; consequently we say that all liabilities were taken over by them, and they are now liable to us. The grounds of the defence are, that it was *ultra vires* of the Hartlepool Company to work a coal mine, and, therefore, the defendant company are not liable for their acts; secondly, that all wrongful acts were condoned by the release of 1864; and, thirdly, that we are precluded from recovering by reason of the Statute of Limitations.

On the first ground, we say that, by the act of 1863, the Hartlepool Company were to sell the mines held by them within the period of five years, and that this was a recognition of their right to work the mines until they should be sold; consequently, it was not *ultra vires* of the Hartlepool Company, and the defendants cannot escape liability on that ground.

*Secondly, as to the release, even if it could be held [850 to apply to our colliery so that all wrongful acts done up to the time the release was signed were condoned, yet that necessarily referred only to the settlement come to between the parties in 1862. Up to that period none of our coal had been taken, and after the boundaries had been readjusted and a new map drawn out and settled, the plaintiffs could not have supposed that while the negotiations were going on the defendants had been violating the terms of the agreement, and had, in 1863, taken away the coal. All this was unknown to the plaintiffs, and was not, in fact, discovered till 1870; therefore the release could not operate upon these intermediate wrongful acts of the defendants.

Then, as to the defence of the Statute of Limitations. It was held in *Bond v. Hopkins* (') that although the statute did not apply in terms to proceedings in equity, yet such

(') 1 H. & N., 459.

(*) E. B. & E., 622, 659; 9 H. L. C., 503.

(*) 2 Sch. & Lef., 413.

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proceedings were affected by analogy to the statute. In courts of equity the statute begins to run from the time when the injury is discovered, *Brooksbank v. Smith* (¹), unless the plaintiff is guilty of laches in not making use of such means as are in his power to discover the acts complained of at an earlier period: *Denys v. Shuckburgh* (²). There was no laches on the part of the plaintiffs, who could not look into the earth to see what the defendants were doing, and could not have supposed they were acting in direct opposition to the plans and agreement entered into. The Hartlepool Company must be taken to have known they were working our coal, or, at any rate, that it did not belong to them. It was not taken under a fair and honest mistake, which might happen to any persons, as in the case of *Wood v. Morewood* (³).

Then we ask for an account of all coal taken away from our mine, on the footing of the decree in the case of *Llynvi Company v. Brogden* (⁴), which was the value of the coals at the pit's mouth, with just allowances for the cost of raising, but not of getting or severing the coal. And we ask for an inquiry as to damages in respect of the destruction of the barriers between the mines. We show by the evidence that this damage will be considerable, since, 851] *when the defendants' mine is worked out and abandoned, the water from the adjacent river will flow into our mine, and will do us a vast amount of injury.

MALINS, V.C.: If I should decide in your favor, probably the better mode of ascertaining this damage will be by a reference to the arbitration of some skilled person.

This proposal was not objected to by counsel on either side.

Bristowe, Q.C., and *Williamson*, for the defendants: Our first ground of defence is, that we are not liable because the West Hartlepool Company had no power to work coal mines. The act of 1863 gave the West Hartlepool Company power to sell mines within five years. If it had been intended that they should work the mines, there would have been power given to them to do so: *Green v. London General Omnibus Co.* (⁵); *Maund v. Monmouthshire Canal Company* (⁶); *Houldsworth v. Evans* (⁷); *Ashbury Railway Carriage and Iron Company v. Riche* (⁸).

We now come to the release. That is clearly and dis-

(¹) 2 Y. & C. Ex., 58.

(²) 4 Y. & C. Ex., 42.

(³) 3 Q. B., 440.

(⁴) Law Rep., 11 Eq., 188.

(⁵) 7 C. B. (N.S.), 290.

(⁶) 4 Man. & G., 452.

(⁷) Law Rep., 3 H. L., 263.

(⁸) Law Rep., 7 H. L., 653.

tinently in favor of the defendants. The words are: "All claims on account of damage of every kind, and whether by trespass or otherwise by either party, are agreed to be condoned and discharged from the signing of this agreement."

The last question, and the most important, is that founded upon the Statute of Limitations—that is, whether the time begins to run from the wrongful act being done, or from the time of its discovery: *In re Kensington Station Act* (*); *In re Stead's Mortgaged Estates* (*); *Hovenden v. Lord Annesley* (*). In this case the trespass was committed more than six years before filing the bill. This is an alleged legal injury done, and the statute says if you have a remedy it is only within six years. Here is an exact legal remedy and an exact legal bar. The case of *Brooksbank v. Smith* (*) was decided upon the fact that the money sought to be recovered was a trust fund, and you might get relief if you *could find the fund in specie. If a man has means [852 of discovering the alleged fraud at an earlier period, and does not do so, then it is laches on his part, and he cannot recover: that was *Denys v. Shuckburgh* (*). So here the first meeting to examine the boundaries took place in July, 1862, which was the beginning of the knowledge the plaintiffs had. From that time the plaintiffs were bound to keep themselves informed of the operations carried on by the defendants. It is evident that whatever coal was taken was by mistake, and not intentionally; and upon the decision in *Dean v. Thwaite* (*), the case on which we mainly rely, the account would be limited to six years; and the same principle was acted upon in *Lockey v. Lockey* (*), *South Sea Company v. Wymondsell* (*), and *Harcourt v. White* (*).

The plaintiffs were put upon inquiry in 1862, and might with reasonable diligence have discovered the wrongful act in 1863, or certainly before the release was executed in 1864.

Glasse, in reply:

[MALINS, V.C.: You need not trouble yourself about the question of *ultra vires*.]

On that subject I should nevertheless wish to refer your Lordship to the case of *Mersey Docks Trustees v. Gibbs* (*), in which it was laid down that trustees may render the property of their beneficiaries liable to third persons for

(1) Law Rep., 20 Eq., 197.

(2) Ch. D., 713.

(3) 2 Sch. & Lef., 607, 613.

(4) 2 Y. & C. Ex., 58.

(5) 4 Y. & C. Ex., 42.

(6) 21 Beav., 621.

(7) Prec. Ch., 518.

(8) 3 P. Wms., 143.

(9) 28 Beav., 303.

(10) Law Rep., 1 H. L., 93, 126.

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acts done in the exercise of the trust, and the distinction is drawn between cases of contract and cases of tort.

Then, as to our being put upon inquiry, there is nothing to show that we were guilty of any laches in the matter. The case of *Lindsay Petroleum Company v. Hurd* (*) shows that where fraud is established against a party, it is for him, if he alleges laches in the other party, to prove when the other acquired a knowledge of the truth, and that he knowingly forebore to assert his right.

The rule laid down in *Dean v. Thwaite* cannot be adopted. If the report were more full it would probably be found 853] that there *was evidence to show that the defendant there was put upon inquiry.

[He also referred to *Bainbridge on Mines* (*).]

Jan. 24. MALINS, V.C.: This bill was filed by the plaintiffs, seeking relief against the defendants in consequence of the boundaries of the colliery having been broken and the coal worked under certain closes of land which were included in the lease to Messrs. Stobart & Co., and which, it was alleged, were worked by the West Hartlepool Company before the property was transferred to the North Eastern Railway Company, under which the plaintiffs contended that the North Eastern Company are liable. And the bill also seeks to recover damages for the consequence of their having broken down the barrier between the two collieries, which it is said is of great importance, and has occasioned great damage to the plaintiffs. The case, which has occupied four days in argument and in hearing the evidence, has been very elaborately argued, and everything has been said on both sides that could be said in the interests of the respective clients, and I have now to decide it.

It may, I think, be assumed that all questions which had arisen up to the 11th of May, 1864, when the agreement was signed between the owners of the adjoining collieries, were then settled, and if the plaintiffs had notice that the coal under Councillor's Copyhold, Ward's Leasehold, and Hunwick Lane had then been worked, I should have been of opinion that this suit could not have been sustained, because it would have shown distinct knowledge at that time: and although it is not in terms a release, yet, looking at the correspondence and all that passed, I think after the expiration of six years the plaintiffs would have been barred from

(*) Law Rep., 5 P. C., 221.

(*) 3d ed., p. 611.

any right to sue for what had been done. But I am of opinion, upon the evidence, that they did not know the fact, and had no reason for suspecting it. Mr. Bristowe, on the part of the defendants, admits that coal had been worked under Councillor's Copyhold—that, in fact, it had been absolutely worked out and *become goaf—that is, they [1854] have not only worked and taken out all they could, leaving proper pillars, but they have worked backwards, let the surface down, and it is what is technically called goaf. I am satisfied from the evidence that coal has also been worked under Ward's Leasehold and under Hunwick Lane. It was argued strenuously by Mr. Bristowe that, although he could not deny that the coal had been worked from Councillor's Copyhold, there was nothing to show when it was worked; and, therefore, I suppose he desired me to infer that it might have been done before the West Hartlepool Company had anything to do with the concern, but I think the evidence proved that point beyond a possibility of doubt. The way in which it was done is shown distinctly by the evidence of Gardner, the overseer of the Hunwick Colliery, who says that he directed Dixon, the overman, to work directly into Councillor's Copyhold. That was in the year 1863. Therefore, if Gardner's evidence is to be relied on, it shows distinctly that it was done by the West Hartlepool Company, and before the document which is called a release of the 11th of May, 1864; but I am satisfied that at that time the fact of its having been done was not known to the plaintiffs. How it was that Gardner, a subordinate officer, gave these directions to work into these properties after the plan had been settled is difficult to understand. I do not make any imputation upon Gardner; there was no improper intention; and indeed the consequence of breaking bounds into an adjoining colliery is so serious, and throws such liabilities on those who break the bounds, that I must assume, although it is clear that this was done, it was done under a mistake, and not with any improper intention to take away from their neighbors that which belonged to them and not to themselves. Then the time at which it was done is distinctly shown by the evidence of Dixon, the overman, who says that he knows of his own personal knowledge that when the West Hartlepool Company took the Hunwick Colliery in February, 1860, none of the coal comprised within Councillor's Copyhold had been worked, and he is quite positive that no portion of such coal had been worked until the year 1863. Now, if I believe this witness—and I am bound to do so, since he was not called for cross-exam-

ination, and there is no imputation on him—that proves the 855] case of the plaintiffs. *Then he shows distinctly by the book called the Yard-book that in the month of January, 1863, he commenced working under this identical property; that he worked out all the pillars as well as the walls and boards, and left all such part in goaf, and that the whole of the coal was so worked out before the beginning of the year 1864.

This, therefore, makes it perfectly clear that it was in the year 1863 that this colliery was worked, and that was during the time the West Hartlepool Company was working it. If, therefore, I had the West Hartlepool Company here instead of the North Eastern Company, I take it to be perfectly clear on this evidence that I should be bound to come to the conclusion that the coal under the plaintiffs' land had been worked by the West Hartlepool Company, and that they would be answerable for the consequences of what they had done. The breaking of the barrier or boundary of the plaintiffs' colliery is, therefore, in my opinion, clearly established, because they could not break into any of this coal without breaking that barrier of forty yards, which ought to have been left, and which would have been, as all the witnesses agree, a perfect protection to the Newton Cap Colliery from any inundation of the adjoining colliery, whatever the amount of the water may have been. Therefore, up to this point, I have come to the conclusion that the coal has been worked by the West Hartlepool Company under the plaintiffs' lands in question, and that the West Hartlepool Company, if they were here, would clearly be liable for the consequences of what has been done.

But Mr. Bristowe, on behalf of the defendants, rests his defence on the effect of the release of the 11th of May, 1864, and he says that the acts of the West Hartlepool Company were *ultra vires*. It is said, with truth, that, inasmuch as they were a harbor and railway company, they had no Parliamentary power to work collieries, that it was altogether beside the object of their incorporation, and that what they did was *ultra vires*. That it is *ultra vires* of a railway company or harbor company to work collieries does not and cannot, in my opinion, admit of the slightest doubt; and, therefore, I am very clearly of opinion with the defendants to that extent that the workings of these collieries by the West Hartlepool Company were altogether unauthorized; 856] and if matters had so *rested, possibly that would be a defence available to the North Eastern Company, who are the successors in title to the West Hartlepool Com-

pany. But these matters having come before Parliament in 1863, when the West Hartlepool Company desired to obtain additional powers, an act was passed in that year, which does not in terms recite the fact that the West Hartlepool Company were working collieries, but it does that which is equivalent to it, and, in my opinion, most distinctly legalizes, by the 51st section, the holding of these collieries by the company, because it gives the company power to sell and absolutely dispose of all collieries and coal royalties in which the company had any interest on such terms and conditions as the company should think proper. Therefore this authorizes them within five years to sell the colliery. That recognizes the fact that they had collieries to sell, and having collieries to sell, it recognizes the fact that they were working collieries, and having authorized them to sell those collieries within five years, I agree with what Mr. Graham Hastings said in opening, that that is an implied authority for the West Hartlepool Company to work the colliery during the period within five years up to the sale taking place. From 1863 to 1868, therefore, they are authorized by act of Parliament, in my opinion, to work collieries, and that which was *ultra vires* up to that time by this act of Parliament became legal, and they were the legal and authorized owners of the collieries, and were authorized at any time within that period to sell them, as sell them they did. That, I think, disposes of the question of *ultra vires*.

Then what took place with regard to these collieries was this. It became expedient and for the interest of the North Eastern Company to amalgamate with this West Hartlepool Company, and accordingly they obtained an act of Parliament authorizing the amalgamation. At that time what was their situation with regard to these collieries? The West Hartlepool Company up to that time, viz., 1864, at all events, had continued to work the collieries. They had sold them in round numbers for £25,000 to two gentlemen named Lancaster and Brogden. Lancaster and Brogden, it appears, entered into possession of this Hunwick Colliery on the 8th of August, 1864. But it appears that at that time they had only paid a deposit of £5,000, and that the whole purchase-money was *not paid. Therefore, the situ- [857
ation of matters at that time was this, that the West Hartlepool Company, to a certain extent, had ceased to be the owners of the colliery, because they had sold it to Lancaster and Brogden, but they had a lien for the unpaid purchase-money, amounting in round numbers to £20,000, and in this state of things they had some interest. There were

other collieries which, I imagine, were unsold, because by the balance-sheets submitted to the shareholders of the North Eastern Railway Company at a half-yearly meeting in February, 1868, among other assets, there was a large amount to be received for collieries. That shows, therefore, that their assets consisted in part of the sum to be received from the West Hartlepool Company for purchase-money either for the collieries already sold to Messrs. Lancaster and Brogden, or for some other collieries. In this state of things the act of Parliament for the amalgamation of the companies passed, and on the passing thereof the West Hartlepool Harbor and Railway Company were dissolved, and all the property, the benefits of the contracts, and everything which the West Hartlepool Company had, was transferred to the North Eastern Company, but subject to all existing contracts, debts, liabilities, engagements, and obligations affecting the same respectively, and to the payment or discharge, performance or observance thereof by the company.

I read this act of Parliament as amounting to this, that whatever liabilities the West Hartlepool Company were under with respect to the property were transferred to and then became the liabilities of the North Eastern Company, and in this way, whatever liability attached to the West Hartlepool Company before these acts now attaches to the North Eastern Company.

The liability of the North Eastern Company being in this manner established, the point which was mainly relied upon by Mr. Bristowe, and upon which the great stress of his argument was laid, was the Statute of Limitations. With regard to the Statute of Limitations, independently of my decision, I should desire to look at it in a common sense point of view, in a view in which such things ought to be dealt with. If a wrong is done under the statute of James, an action for trespass can only be maintained like any other action at common law within six years after the 868] *act done; and, accordingly, in the case of *Hunter v. Gibbons* (¹), where I think an action was brought for a wrong done more than six years before, which had not been discovered, the plaintiff attempted to get out of the difficulty by an equitable plea, but the Court of Exchequer would not allow an equitable plea, and the Lord Chief Baron Pollock said that if they wanted that, they must go to a court of equity, which would, in his opinion, not be bound by the Statute of Limitations. Take the common case.

(¹) 1 H. & N., 459.

Suppose A. is the owner of an estate under which it is well known there is a valuable seam of coal, or many seams of coal, and that B. is the owner of an adjoining estate containing the same seam or seams of coal, A., in perfect security, not desiring at present, for various reasons which might be suggested, to sink shafts upon his property, keeps it, as he believes, intact. B., his neighbor, all this time works actively and raises, as in the present case, hundreds of tons of coal a day. A., believing that all the coal he sees being raised by B. comes from under his neighbor's estate, and in perfect security says, "This is so profitable an operation which my neighbor is carrying on, that I am inclined to do the same;" and he accordingly authorizes a shaft to be sunk, and then discovers that for more than six years a large portion of his coal has been worked by his neighbor. It is argued that under those circumstances he has no remedy, because it was done more than six years ago, although he did not know it, and had no means of knowing it, because he could not look through the solid earth, and could not have found it out without having recourse to that which would be totally uncalled for and unjustifiable on his part, namely, asking to go down his neighbor's pit to see that they were not doing that which he had no right to assume they were doing. It is gravely argued that under these circumstances he has no remedy. But it has been the settled rule of this court for more than a century that wherever there is fraud, and this would be fraud, the time begins to run only from the discovery of the fraud, and most reasonably, because on what principle is it that the Statute of Limitations is a bar? Because it is considered that there is laches on the part of the person suing. If he has had a right for more than six years, and it is known he has had *that right, to lie by for six years, or any other [859 number of years prescribed by the Statute of Limitations, is laches which is binding on him; and, therefore, if he will lie by, the statute runs against him; but how can there be any laches when he does not know of the act done?

The case of the *South Sea Company v. Wymondsell* (') is a leading case on the subject, and appears to me to proceed on the clearest principles. There the fraud had been committed long before, but had then been discovered within six years, and the decision was, that although the fraud had been committed more than six years, as it was discovered within six years, the time only began to run from the dis-

(') 3 P. Wms., 143.

covery: that is the time when the plaintiff was first guilty of laches.

Now we all know that before the 3 & 4 Will. 4, c. 27, the Statute of Limitations was not binding in courts of equity, but, as Lord Redesdale expresses it in *Hovenden v. Lord Annesley* (¹), where there is no fraud or any particular circumstances, courts of equity act not merely by analogy, but in obedience to the statute. Therefore, where there is no fraud, that which would be binding in a court of law would be also binding in a court of equity, and, consequently, twenty years was a bar to claims in equity, because that period would be a bar at law; but in a passage from Lord Redesdale's judgment in *Bond v. Hopkins* he says (²): "Nothing is better established in courts of equity . . . than that where a title exists at law and in conscience, and the effectual assertion of it at law is unconscientiously obstructed, relief should be given in equity; and that where a title exists in conscience, though there be none at law, relief should also, though in a different mode, be given in equity. Both these cases are considered by courts of equity as affected by the Statute of Limitations: that is, if the equitable title be not sued upon within the time, within which a legal title of the same nature ought to be sued upon, to prevent the bar created by the statute; the court, acting by analogy to the statute, will not relieve. If the party be guilty of such laches in prosecuting his equitable title as would bar him; if his title were solely at law, he shall be barred in equity." 860] But equity will remove the legal bar *proceeding from lapse of time as it would any other legal advantage if sought to be used unconscientiously. That is all the relation this statute has or ought to have on proceedings in equity.

The same principle is acted on in a case of *Brooksbank v. Smith* (³). That was a case upon the discovery of a mistake. The mistake had been committed much more than six years before, but had been discovered within the six years, and the question was whether a suit to correct the mistake could be maintained. Mr. Baron Alderson says: "Then is the Statute of Limitations a bar to the remedy sought by this bill? It seems to me that it is not so. The statute does not absolutely bind courts of equity, but they adopt it as a rule to assist their discretion. In cases of fraud, however, they hold that the statute runs from the discovery, because the laches of the plaintiff commences

(¹) 2 Sch. & Lef., 607, 630.

(²) 2 Y. & C. Ex., 58.

(³) 1 Sch. & Lef., 429.

from that date on his acquaintance with all the circumstances." Laches, therefore, cannot run until the facts are known.

Then Mr. Bainbridge, in his very learned and able treatise on the law of mines⁽¹⁾, discusses the law upon the same principles, and cites, in support of what he lays down as the law, the cases of *Denys v. Shuckburgh* ⁽²⁾, *Hunter v. Gibbons* ⁽³⁾, and *Dean v. Thwaite* ⁽⁴⁾, and many other authorities.

The law therefore is, I think, clearly settled that in cases of fraud the Statute of Limitations does not begin to run until the fraud is discovered; and although it is not necessary in this particular case to come to the conclusion that what was done was done fraudulently, yet for the purpose of this distinction between cases which are fraudulent and cases which are not—although, I repeat, I may be distinctly of opinion that neither the West Hartlepool Company (and as a corporation they could not commit a fraud) nor their agents, who were incapable of doing so, intended to commit a fraud—yet, for the purposes of the statute, the breaking of bounds into your neighbor's colliery must be considered a fraudulent act; and, therefore, it is now clearly by these authorities settled, in my opinion, that in all cases of fraud the time for barring the statute begins to run only from the time *the fraud was discovered, or by reasonable diligence might have been discovered. [861

Then it is said that in this case by reasonable diligence this fraud might have been discovered in 1864. Now this is a part of the argument of Mr. Bristowe which made the most serious impression upon my mind. He says these parties carried on a long negotiation from 1862 to 1864; it was known that in 1862 there had been a mistake as to the boundaries; the Hunwick Collieries had been worked very extensively ever since; and in 1864, by reasonable diligence, they might have discovered that these particular lands had been worked under by the neighboring colliery. Now this depends a great deal upon the inquiry a man is bound to make. I do not refer to it in detail, but the learned counsel engaged in the case will remember very well the distinct manner in which Johnson gave his evidence. He described the circumstances under which the new boundary map was prepared in 1862. It is said that in 1864 they might have made inquiry whether this land had been worked under between 1862 and 1864. In 1862 these boundaries were set-

(1) 3d ed., p. 611.

(2) 4 Y. & C. Ex., 42.

(3) 1 H. & N., 459.

(4) 21 Beav., 621.

tled, and in 1864 this apparent settlement of all differences took place. Now was there anything to lead them to believe or suspect, or were they bound to suspect or to make inquiries as to whether these boundaries which had been so formally settled by the agents of the West Hartlepool Company in 1862 had been broken into or transgressed between 1862 and 1864? It now turns out, from the evidence of Mr. Dixon and Mr. Gardner, that the bounds were in point of fact broken and the coal abstracted in 1863. Mr. Dixon said it was all done before the 1st of January, 1864; that it began in 1863 and ended in 1863. At the time, therefore, when this correspondence was taking place, one side knew undoubtedly. The agents of the Hunwick Colliery, which is the West Hartlepool Company, knew perfectly well that they had broken the bounds, that they had worked the coal under Councillor's Copyhold, and under Ward's Leasehold, and under Hunwick Lane. Did they communicate that fact? That is not pretended. Did the other side know it? There is not a particle of evidence to show they did. Mr. Bristowe says they ought to have made inquiry. Are you bound to make inquiry of your neighbor whether he has 862] robbed you or not? If you *have a neighbor and treat him as a respectable person who would not do so improper an act, I cannot conceive that there can be any necessity on the part of the plaintiffs to make the inquiry. "Have you violated these boundaries which we settled in 1862? Did you in 1863, in defiance of all that, break the bounds and carry away 100,000 tons of our coal, and break our barrier so as to expose us to inundations from your colliery?" I cannot consider that reasonable diligence required it. Therefore, inasmuch as one party did know it, and might have communicated it and failed to do so, and the other party did not know it, I am of opinion there was nothing calling for inquiry on their part, and that there was no want of reasonable diligence in their not discovering, in 1864, that which they might have discovered. I think there was no necessity to take any steps of that kind; and, therefore, I cannot come to the conclusion which Mr. Bristowe desired I should do, that it might have been discovered with reasonable diligence.

There was one case I passed over which I intended to mention—the case of *Bonomi v. Backhouse* (*). That decides that where by the working of a colliery that had been done at a more remote period than six years, which caused an injury to occur within six years, the action could be

(*) 9 H. L. C., 503.

maintainable within six years from the time of the injury being done. The questions put to the learned judges by Lord Westbury were these: "A. B. is the owner of a house; C. D. is the owner of a mine under the house, and under the surrounding land; C. D. works the mine, and in so doing leaves insufficient support to the house. The house is not damaged, nor is the enjoyment of it prejudiced until some time after the workings have ceased. Can A. B. bring an action at any time within six years after the mischief happened, or must he bring it within six years after the workings rendered the support insufficient?" The learned judges retired to consider the question, and the Lord Chief Baron then said: "My Lords, I am desired by my learned Brothers to deliver our unanimous opinion in reply to your Lordships' question. We are all of opinion that A. B. may bring an action at any time within six years after the mischief done, and we are of that opinion for the reasons given in the judgment of the Court of Exchequer Chamber." That was *adopted [863 by the House of Lords, and it was decided that the action was maintainable.

The case which Mr. Bristowe relied on in support of his argument was the decision of the case of *Denys v. Shuckburgh* (¹), which I must say appears to me to lay down the very reasonable rule that you may maintain an action after the expiration of six years, if you did not know, or had not reasonable means of knowing, the fact. Six years will only be a bar when you have knowledge, or by reasonable diligence might have obtained knowledge. It resolves itself into a question of fact, whether there has or has not been a want of reasonable diligence in making the inquiry. For the reasons I have stated, there was no want of reasonable diligence in this case, and, therefore, this authority of *Denys v. Shuckburgh* does not apply.

But very great reliance was placed on the decision of Lord Romilly, the Master of the Rolls, in the case of *Dean v. Thwaite* (²). The case is, as Mr. Glasse says, very shortly reported, and the facts are very meagerly stated. They are these: "The plaintiff's estate adjoined that of the defendant. The defendant's husband, prior to his death in 1851, and the defendant subsequently had, in working their own collieries, passed into and worked the plaintiff's coal, and this, it was alleged, had been done since 1840. The plaintiff filed the bill against Mrs. Thwaite and the representatives of her husband for an account of the coal thus

(¹) 4 Y. & C. Ex., 42.
21 ENG. REP.

(²) 21 Beav., 621.

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Ecclesiastical Com'rs, &c., v. North Eastern Ry. Co.

V.C.M.

improperly taken, and for payment of the value, and for an injunction." The time when this was discovered is not stated, and the circumstances are not stated. There is merely the broad fact that from 1840, this suit being heard in 1855, these workings into the plaintiff's colliery had been going on. "Mr. Roundell Palmer and Mr. Cairns, for the plaintiff, asked for a general account, contending that the Statute of Limitations did not apply to the case of a concealed fraud, and that time only ran from the discovery of the wrong." They cited *Brooksbank v. Smith* ⁽¹⁾, *South Sea Company v. Wymondsell* ⁽²⁾, *Hovenden v. Lord Annesley* ⁽³⁾, *Booth v. Earl of Warrington* ⁽⁴⁾ and *Blair v. Bromley* ⁽⁵⁾, which was a case of *fraud with regard to a trust fund. There the Master of the Rolls, on the facts stated, lays down a rule which I confess I cannot concur in. He says ⁽⁶⁾: "The question of liability with respect to the working of minerals under ground, which cannot be perceived in the same way as operations upon the surface, stands, in my opinion, in a very peculiar light; and it is very important to consider upon whom the burthen of proof lies in a case of this description. In my opinion the burthen of proof lies upon the wrongdoer to show that the coal has not been taken from the plaintiff's property within the time during which this court would make him accountable for it. It was impossible for the plaintiff to ascertain that fact; it was solely within the knowledge of the defendants and their workmen." This seems to assume that the burthen of proof is on the wrongdoer, but it also seems to assume that if the wrongdoer proves that all the coal that was taken away was taken more than six years ago the plaintiff has no remedy. That is too broad, in my opinion. If it was taken away more than six years ago, and the plaintiff knew that, or had the means of knowing it, then it is very reasonable that the statute should be applied; but, according to this, although in the case I have suggested a man may have an estate which he believes to be untouched, and his neighbor may have robbed him more than six years ago, but he does not find him out, according to this decision he may rob him successfully, because the Statute of Limitations applies, and there is no remedy. That, in my opinion, lays down the rule far too broadly.

If Lord Romilly meant to say, Let him prove that it was done more than six years, and the plaintiff knew it, then it

⁽¹⁾ 2 Y. & C. Ex., 58.

⁽²⁾ 3 P. Wms., 143.

⁽³⁾ 2 Sch. & Lef., 629, 630.

⁽⁴⁾ 4 Bro. P. C. (Tom. ed.), 163.

⁽⁵⁾ 21 Beav., 622.

is certainly in accordance with all the other decisions, and with my view of the case. His Lordship reserved his decision, and on the following day said: "I retain the opinion which I expressed yesterday, that an account ought to be directed, but that it must be confined to the coal gotten within six years before the filing of the bill." If that is laid down as an unqualified rule, it is one in which I cannot concur, but upon the whole I think the real ground upon which the Master of the Rolls refused to give more than an account for six years was that there was laches on the part of the *plaintiff; that he either did know, or by [865] reasonable diligence might have known, that the wrong had been done, and that he was guilty of that negligence which made it proper that the statute should run against him.

Upon these grounds I have come to the conclusion that this defence of the Statute of Limitations entirely fails the defendants, and that there was no knowledge on the part of the plaintiffs, nor any reasonable means of acquiring knowledge, and no omission to ascertain their rights, and no failure to resort to reasonable means of doing so; and I am therefore of opinion that although a wrong was done in 1863, inasmuch as it was not discovered till 1870, the bill was properly filed within six years from that time, namely, in 1872.

Now, with regard to the mode of discovery, it appears by the evidence that the owners of the Newton Cap Colliery in the ordinary prosecution of their business went on with their workings towards Councillor's Copyhold and Ward's Leasehold, and to this lane in question. When they got there, to their surprise they found the coal had all been worked out. There ought to have been between Councillor's Copyhold and the Hunwick Colliery a barrier of forty yards. That barrier had of course been worked through, in order to get into Councillor's Copyhold, and towards Ward's Leasehold the same, and Hunwick Lane the same. This led to a correspondence between the parties, and it was finally ascertained in 1870 that the coal had been worked under those lands, and that the bounds had been broken in the manner I have stated.

There is only one point I have passed over, which was this: I pointed out that the North Eastern Company acquired the right to these lands which the West Hartlepool Company had sold to Lancaster and Brogden, and that the West Hartlepool Company had received only a portion of the purchase-money in the shape of a deposit. The bulk of the purchase-money was received by the North Eastern

Company. That seems to have been wholly unknown to the defendants' advisers till Mr. Borrett produced the deed and read the recitals in it. The conveyance is dated the 8th of August, 1870, no less than six years after Lancaster and Brogden entered into possession, when to my mind it is clear they had not paid the purchase-money, because, if they had, 866] they would *undoubtedly have taken a conveyance of the estate. On the 8th of August, 1870, the receipt of the purchase-money of £20,000 and upwards was acknowledged by the railway company under their corporate seal in the usual way. The money was paid to them, and therefore it is clear they get the advantage of the purchase-money for this colliery. They had all the advantage except the deposit of £5,000 paid to the West Hartlepool Company, and with the property they must, in my opinion, take the burden, and take it subject to all contracts, liabilities, debts, and engagements affecting the same. The argument addressed to me by Mr. Bristowe was this: that because this was a wrongful act, therefore a purchaser from them ought not to be held liable. If that were so, Parliament would have done the greatest injustice, because the wrongdoers themselves have actually ceased to exist by act of Parliament. Therefore, if the liability is not transferred to their transferees, the consequence is that there is a great wrong done, for which a suit can be maintained, but for which nobody is liable. To say that, would be to say that Parliament has done an act of the grossest injustice by transferring the benefits to the defendants and not the liabilities.

Upon the whole of the case, therefore, I have come to the conclusion, first, that the coal under these lands was originally part of the demise by the lease of 1846 to the plaintiffs, the owners of Newton Cap Colliery; that it was erroneously placed on the map of the Hunwick Colliery as being within the boundaries of the Hunwick Colliery; that it was set right in 1862 by Mr. Johnson, in the manner he described in his evidence; and, with the knowledge of all parties, it was then ascertained to belong to the Newton Cap Colliery, and the West Hartlepool Company ought from that time to have been most anxious not to touch any of the coal of these lands. In defiance of that, it is proved to my satisfaction, that although it was done inadvertently, in 1863 this very land which they had acknowledged in 1862 to be part of the Newton Cap Colliery was entered upon, the bounds broken, and the coal worked out from it, for which, in my opinion, the West Hartlepool Company became liable, and if they were here now, I should not have a shadow of a doubt on

the subject. It is also proved that the fact of the coal having been so worked and the boundaries broken was unknown *to the plaintiffs until 1870, and that there [867 was no want of diligence on their part in not discovering it at an earlier period. I am of opinion that the statute begins to run on this subject from the time of the discovery, which was in 1870, and the bill was filed in 1872. Therefore, in my opinion, all the defences that have been set up entirely fail, and the plaintiffs have established their right to a decree in substance such as they ask, which is an account of the coal which has been improperly worked, and for the damages occasioned by breaking the barriers between the two collieries. Upon that subject, although much evidence was attempted to be given, and many observations made by Mr. Bristowe in his very able comments on the case, I have come to the conclusion that he has entirely failed to establish that there would be no danger to the Newton Cap Colliery from the breaking of those bounds, because I am satisfied that it is proved that the coal in the Newton Cap Colliery will last many years after the Hunwick Colliery is worked out and abandoned and left to nature. Therefore there will be very great danger of the water getting into the Newton Cap Colliery. It is not necessary for me to decide that question, the parties having agreed that if I should decide there is a case against the defendants for an account of damages, instead of sending it to my chambers to be inquired into, it shall be referred to some skilled person or persons to ascertain what damages have been sustained by the working of the coal and the breaking of the bounds.

I will only add this. I suppose I am right in saying that the real plaintiffs are not the Ecclesiastical Commissioners, but their lessees, and that it may be a matter of some importance to them; but the Ecclesiastical Commissioners themselves are, I suppose, the greatest landowners in the country, and it would not be of much importance to them whether they have any damages or not; and I cannot help thinking they would act very reasonably if they would make a settlement of the matter without going any further.

Glasse: Your Lordship will not make any distinction between the plaintiffs on the face of the decree.

MALINS, V.C.: No. I cannot. The Ecclesiastical Commissioners *sue in respect of the injury to the rever- [868 sion, and the other plaintiffs in respect of the injury to the collieries.

Glasse: I ask that the decree may be in the same form as in the *Llynvi Company v. Brogden* ⁽¹⁾.

Williamson asked that the decree should be taken as in *Hilton v. Woods* ⁽²⁾, where, in assessing compensation for coal already gotten by the defendant, the court being of opinion that he had worked it inadvertently, and not fraudulently, held that he was to pay only the fair value of such coal as if he had purchased the mine from the plaintiffs.

Glasse: I cannot consent to any other decree than such as was made in the *Llynvi Company v. Brogden*.

MALINS, V.C.: I was in hopes that the plaintiffs would have consented to a decree as in *Hilton v. Woods*, but as they will not, it must be according to the *Llynvi Company v. Brogden*; therefore there must be an account of all coals and other materials worked by the West Hartlepool Company from the Newton Cap Colliery and the mines therein comprised, and the value of such coal at the pit's mouth, making to the defendants all just allowances for the costs and expenses incurred by them in bringing such coal to the pit's mouth, but not including the cost of getting or severing the coal. Then there must be an account of the damages sustained by the plaintiffs by reason of the defendants having broken through the boundary between their mine and the plaintiffs' mine, and the defendants must pay the costs of the suit up to and including the hearing, and the subsequent costs will be reserved. I understand that the parties are willing that the reference should be to some skilled person instead of to the Chief Clerk. That can be arranged out of court. In form the reference will be to chambers, but in substance I shall direct that the account shall be taken by some skilled person, and if the parties cannot agree on a name I shall select some person, as I have the power of doing.

Solicitors: *White, Borrett & Co.*; *Williamson, Hill & Co.*

⁽¹⁾ Law Rep., 11 Eq., 188.

⁽²⁾ Law Rep., 4 Eq., 432.

[4 Chancery Division, 882.]

V.C.H., Feb. 19, 1877.

*GREEN V. CARLILL.

[882

[1875 G. 9a.]

Legacy to Separate Use of Wife—Country Draft on London Bankers—Indorsement to Husband—Payment to Husband's Deposit Account—Death of Husband—Claim by Widow against Executors.

M. G., to whom a legacy had been bequeathed to her separate use, received an uncrossed country banker's draft, payable in London, for the amount, less the duty, and she indorsed the draft and handed it over to her husband, and his bankers received the amount and placed it by his direction to his deposit account. The husband died suddenly a few days after. There was evidence pointing to the fact that the wife did not intend to give the check to her husband. In an action against his executors:

Held, that the widow was entitled to be paid the sum claimed.

In May, 1873, Mary Green, the wife of Stephen Green, of Clapham Park, became entitled, under the will of a late aunt, to a legacy of £2,500, less the duty, which was bequeathed to her for her separate use. On the 21st of May, 1874, Mrs. Green received from her late aunt's executors a draft in this form:—

“No. H. S. 314 West Riding Union Banking
Company, £2,425.

“Huddersfield, 19th May, 1874.

“On demand pay to the order of Mrs. Mary Green two thousand four hundred and twenty-five pounds value received.

“For the Directors and Proprietors,

“Jno. G. Bury,

“The London and Westminster Bank,

“Manager.

“Lothbury, London.”

There was written across the face of the draft the words “not exceeding twenty-four hundred and twenty-five pounds.”

Mrs. Green having written on the back of the draft the words “(Indorsed,) Pay Mr. Stephen Green,

“Mary Green,”

handed it to Mr. Green, who wrote his name underneath his wife's, *and he, on the same day, paid it in to [883 his account at the London Joint Stock Bank thus:—

“Credit Stephen Green.

“West Riding Union Banking Company, £2,425 0s. 0d.

“Please place the above to my deposit account.

“Stephen Green.”

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And he also drew a check, "Pay to deposit account," on that bank for the sum mentioned above. The original draft was not crossed, and consequently it might have been paid to Mrs. Green in person at the London and Westminster Bank, or, after her indorsement, to the bearer. It was not necessary that a banker should collect it, nor was it necessary for Mrs. Green to write "Pay Mr. Stephen Green." A few days after paying the check Mr. Green showed his wife the deposit note, and told her what he had done with the money. He also made an entry recording the fact of the deposit in a memorandum book in which he kept an account of receipts and payments, but this entry was in red ink, while all the other entries were in black ink. Mr. Green died suddenly on the 1st of June, 1874. Mrs. Green brought this action against the executors of her late husband, claiming that the husband might be declared to have been a trustee for her, and that his executors might be ordered to pay to her the sum above mentioned. In her evidence *viva voce* she deposed that she never intended to make a gift of the draft to her husband, and on cross-examination she stated that on the day upon which she received the draft she told her husband that she would like to have the money settled upon herself, and that he replied, "Not with my consent;" that she then said, "she would like to be able to will it away;" but nothing more was done or said about it. Mrs. Green further stated that she knew her late husband had always entertained a great dislike to settlements. The action, though not hostile, was necessary, as the executors considered that they could not pay the money to the widow, even if she were entitled to it, without the sanction of the court. It appeared in evidence that Mrs. Green had been entitled to a sum in a cause, and that she sanctioned the payment of it to her husband.

884] **Hastings*, Q.C., and *Fellows*, for the widow, stated the facts, and submitted that the draft was not handed over by her to her late husband for his own benefit, but only that he might, more conveniently than she could herself, obtain payment of the money for her.

Dickinson, Q.C., and *Nalder*, contended that there had been by the indorsement and the handing over a complete parting with the draft in favor of the husband. They referred to *Woodward v. Woodward* (').

Macnaghten for the executors.

HALL, V.C.: I am of opinion that there was not enough done to make this draft, which was separate estate, the

(') 3 D. J. & S., 672.

property of the husband. It was not convenient to the plaintiff to receive the money herself, and she, having first indorsed the draft, got her husband to receive the money for it. There is no evidence to show that the plaintiff desired to part with the absolute control over the money, but I think the evidence is clearly the other way. The declaration will be that the plaintiff is entitled to be paid the money claimed.

Solicitors: *Evans, Foster & Rutter; Collyer-Bristow, Withers & Russell*, agents for Carlill, Hull; *J. G. Hepburn & Sons*.

[4 Chancery Division, 885.]

V.C.H., Feb. 20, 1877.

*BARBER V. WOOD.

[885

[1876 B. 79.]

Devise of Real Estate—Misdescription—Intestacy.

Testator devised his freehold property at M. in trust for his children, a son and daughter, equally. He had no freehold property at M., but he had two undivided fourth shares of some in R., which M. adjoined, and in which parish it was situate: *Held*, that the property in R. descended to the heir-at-law.

WILLIAM BARBER, of Hoyland Nether, who died on the 16th of June, 1869, by will, dated the 15th of that month, after directing that all his just debts, funeral and testamentary expenses, should be paid by his executors, said: "I give and devise all my freehold property in Hoyland aforesaid, as well as my personal property, and also my freehold property at Masbro' and property at Thorpe Hesley; to" two trustees named, whom he also appointed executors, "in trust for my two children, Ann Elizabeth Barber and William Barber, share and share alike, the aforesaid property to be sold and divided as my children may agree when my youngest child, the aforesaid William Barber, may attain his twenty-first year." The trustees were to receive the rents, and other moneys due to the testator, and to apply the same in maintaining the children, and the balance was to be invested for their sole benefit. The testator was never seised of any freehold property at Masbro', but at the dates of his will and death he was seised of two undivided fourth shares of certain freehold property in Roth-erham to which Masbro' adjoined, and in the parish of which Masbro' was situate. The personalty was stated to be insufficient to pay the debts.

This was an action for administration by the infant son by his next friend.

Romer, for the plaintiff, after referring to the cases of *Miller v. Travers* ⁽¹⁾, *Stanley v. Stanley* ⁽²⁾, and to Jarman 886] on Wills ⁽³⁾, *submitted that there was nothing to be gathered from the will that the testator intended to devise property in Rotherham under the description of his freehold property at Masbro'; and that there was a fatal misdescription and an intestacy.

Dunning, for the defendants, the executor, and the infant daughter, argued that if it should be held that the property in Rotherham did not pass by this devise under the description of his freehold property at Masbro', it would be cutting out a part of the writ. The misdescription, if any, was very small, as Masbro' was in fact a part of Rotherham.

HALL, V.C.: I am of opinion that the view contended for by Mr. Romer is the right one, and therefore I hold that this property descended to the infant heir-at-law, but it must be the first real estate to be applied in payment of debts, in case there be a deficiency in the personalty.

Solicitors: *Bell, Brodrick & Gray*, agents for Badger & Rhodes, Rotherham.

⁽¹⁾ 8 Bing., 244.

⁽²⁾ 2 J. & H., 491.

⁽³⁾ 8d ed., vol. i, p. 413.

[5 Chancery Division, 19.]

V.C.H., June 19, 1876 : C.A., Feb. 15, 1877.

*TOLSON V. SHEARD.

[19]

[1875 T. 29.]

Power of Leasing—Mining Lease—Lease by Trustees of Two Estates held on Distinct Trusts—Settled Estates Act, 1856 (19 & 20 Vict. c. 120), s. 10—Specific Performance.

Two contiguous estates were devised to trustees upon trust for distinct *cestuis que trust*. By an order made under the Settled Estates Act, power was given to the trustees to grant mining leases in conformity with and subject to the provisions of the Settled Estates Act; such leases to be granted with the consent of the respective tenants for life if of age. The trustees and the two tenants for life entered into an agreement with the defendants to grant them a mining lease of the two estates for forty years (or fifty years if the court should consent); both estates were intended to be comprised in the same lease, and the rents and royalties were to be reserved as if they were one estate, and there was to be one shaft for working the minerals under both estates; and it was also agreed that the lessor should be at liberty to apply to the court under the Settled Estates Act for further powers of leasing:

Held (affirming the decision of Hall, V.C.), that the trustees had no power to grant such a lease of the two estates, and specific performance of the agreement was refused.

Whether in any case a lease by trustees by one demise of two estates held upon distinct trusts would not be a breach of trust—*Quare*.

[5 Chancery Division, 27.]

C.A., Dec. 21, 1876: Feb. 15, 1877.

* *Ex parte ATTWATER. In re TURNER.*

[27]

Unregistered Bill of Sale—Possession taken by Grantee before Filing of Liquidation Petition by Grantor—Prior secret Act of Bankruptcy—Relation back of Trustee's Title—Protected Transaction—Leave to appeal to House of Lords—Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 11, 71, 94, 95, 125.

In the 1st section of the Bills of Sale Act, 1854, the "time of such bankruptcy" means the time of the act of bankruptcy.

The grantee, under an unregistered bill of sale, took possession of the property comprised in it before the filing of a liquidation petition by the grantor. The day before possession was taken the grantor had committed an act of bankruptcy of which the grantee had no notice:

Held, that the title of the grantee was defeated by virtue of the relation back of the title of the trustee in the liquidation to the earlier act of bankruptcy.

The protecting clauses of the Bankruptcy Act, 1869, ss. 94 and 95, have no operation as regards a transaction which is made void by the Bills of Sale Act.

Leave to appeal to the House of Lords refused.

The principles upon which the court acts in granting or refusing leave to appeal to House of Lords explained.

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lars of 10 bales, waiting your forwarding instructions." The letter contained particulars of the goods, and described the

bales as 21-30, marked " W. W.
L. Shanghai." On the 22d of

March Watson sent an invoice of the goods to Love, headed

"Mr. R. E. Love,
Bought of Wm. Watson,"

the price of the goods being £443 10s. On the 23d of March, 1876, Love wrote to Copperthwaite: "Please send the 10 bales lastings to the Gordon Castle loading in the South West India Docks for Shanghai. I inclose card of the vessel. I should have sent forwarding instructions before, but there was no vessel ready." In reply to this, on the 24th of March, 1876, Copperthwaite wrote to Love: "I have forwarded the 10 bales per Great Northern for steamer Gordon 38] Castle, S. W. I. Docks, carriage paid, £2 2s. 7d., *at your disposal." It was admitted that the carriage was paid by Watson. On the 24th of March, 1876, Watson wrote to Love as follows:—

"Mr. R. E. Love	Mar. 24, 1876.
To William Watson.	
"March 22. To goods	£443 10 0
By discount	11 2 0
	£432 8 0
To 6 months' interest	10 16 3
" pattern books	0 8 9
" stamp	0 5 0
	£443 18 0

"Dear Sir,—We have to-day drawn for the above amount at 6 m/d. Please accept on presentation."

Love accepted the bill and returned it to Watson. The goods were forwarded by the Great Northern Railway Company to their Poplar Dock Station, and Love received the following advice-note from the company:—

"Great Northern Railway,
"Poplar Dock Station,
"March 25, 1876.

"Advice of goods.

"Mr. R. E. Love,—The undermentioned goods consigned to you having arrived at this station I will thank you for instructions as to their removal hence as soon as possible, as they remain here to your order and are now held by the

company, not as common carriers, but as warehousemen, at owners' sole risk of loss or damage by deterioration or fire, and subject to the usual warehouse charges, in addition to charges now advised."

This part of the note was in print. Then followed a description of the goods, as 10 bales, from Copperthwaite,

Bradford, marked W. W.
L. Shanghai, 21/30, and it was stated

that the freight was paid. There was added in writing—"Will be sent to the Gordon Castle, S. W. I. Dk." The goods were, on the 28th *of March, 1876, shipped on [39 board the Gordon Castle, of which Thomas Skinner & Co. were the owners. The bills of lading were by Love's direction made out to the order of himself or his assigns. They were sent by him to Skinner & Co. for signature, and were duly signed by them on the 29th of March, 1876, and would have been delivered to Love upon payment of £3 13s. for freight, but they were never taken up by him, and at the commencement of his bankruptcy (to be presently stated) the bills of lading were still in the hands of Skinner & Co. On the 5th of April, 1876, Love suspended payment, and gave notice to Watson that he had done so. On the 6th of April one H. F. Jörss, of Manchester, at the request of Watson, wrote to W. Pustan, of Hamburg, requesting him to telegraph at once to his house at Shanghai to attach the ten bales on their arrival there and to obtain delivery of the bills of lading, and Pustan, on the 8th of April, telegraphed accordingly. On the 11th of April, Jörss, by Watson's directions, telegraphed in Watson's name to Rothwell, Love & Co., at Shanghai, requesting them to deliver the goods to Pustan & Co., of Shanghai, and on the same day Watson himself wrote a letter to Rothwell, Love & Co., informing them of the telegram, and referring to the agreement of the 10th of February, of which he said he had forwarded a copy to Pustan & Co., at Shanghai. On the 8th of April, 1876, the Gordon Castle sailed from London for Shanghai. On the 12th of April Love filed a liquidation petition, and on the 30th of May he was adjudicated a bankrupt. On the 21st of June Everingham Smith was appointed trustee in the bankruptcy. He had previously been appointed receiver under the petition, and had demanded from Skinner & Co. delivery of the bills of lading of the goods. Watson had also demanded the bills of lading from Skinner & Co. Ultimately an arrangement was made that the goods

should be sold by Skinner & Co.'s agents at Shanghai, and the proceeds of sale (after deducting their charges and costs) be held by them for the persons who should be entitled to them. Application was made to the Court of Bankruptcy to decide the rights of the parties. The registrar made an order declaring that the trustee was entitled to the bills of lading and to the proceeds of sale of the goods.

Watson appealed.

40] **Horne Payne*, for the appellant: It is said on the other side that the goods were in the order and disposition of the bankrupt at the commencement of the bankruptcy. But if the appellant was the true owner, the bankrupt's possession was not with his consent; his possession arose from the fact that, in violation of his agreement, he had the bills of lading made out to his own order. The appellant did all he could to determine his consent to the reputed ownership of the bankrupt, and that is sufficient: *Load v. Green* (¹); *Smith v. Hudson* (²); *Ex parte Montagu* (³); *Williams on Bankruptcy* (⁴).

[BRAMWELL, J.A., referred to *Belcher v. Bellamy* (⁵).]

Unless, however, the appellant was the true owner of the goods, the question of order and disposition does not arise: *Townley v. Crump* (⁶). The trustee also contends that the appellant had no 'right to stop the goods *in transitu*, because the transit was ended. This argument assumes that the bankrupt was the true owner of the goods. The agreement between the parties was that the transit should continue up to Shanghai, and the telegrams sent by the vendor were sufficient notice of stoppage *in transitu*: *Rodger v. Comptoir d'Escompte de Paris* (⁷). *Rothwell, Love & Co.*, to whom the goods were consigned, were *quasi* trustees for both vendor and purchaser. Another argument used against the appellant is that the agreement giving him a lien required registration under the Bills of Sale Act (17 & 18 Vict. c. 36) to make it valid as against the trustee in Love's bankruptcy. I contend that the agreement is not within the definition of a bill of sale contained in sect. 7 of the act unless it comes within the words "other assurances of personal chattels." But there is no decision that those words would include such an agreement. *Holroyd v. Marshall* (⁸) does not go to that extent, nor does *Edwards v. Ed-*

(¹) 15 M. & W., 216.

(²) 6 B. & S., 431.

(³) 1 Ch. D., 554.

(⁴) 2d ed., p. 103.

(⁵) 2 Ex., 303.

(⁶) 4 A. & E., 58.

(⁷) Law Rep., 2 P. C., 393.

(⁸) 10 H. L. C., 191.

wards ('). If, however, this agreement falls within those words, it is also within the exception of "transfers of goods in the ordinary course of *business of any trade." At [41 any rate, the goods were not in the actual or apparent possession of the bankrupt at the time of his bankruptcy, as they were on a ship at sea, and the appellant had a right to stop them *in transitu*.

Everitt, and *R. T. Reid*, for the trustee: The true meaning of the agreement is this, that the property in the goods passed to the bankrupt, and that the vendor had only an equitable charge on them as a collateral security for payment of the bills of exchange. The goods were sent to the purchaser's agent. An agreement creating such a charge comes within the terms of the Bills of Sale Act. *Ancona v. Rogers* (') shows that, if the goods were in the possession of a bailee for Love, they were still in his possession for the purposes of the Bills of Sale Act. The bankruptcy took place before any notice of the claim of the vendor could have reached the consignees at Shanghai; indeed there is no evidence when the telegrams reached them. An equitable mortgagee must, in order to complete his title, give notice to the person who has the custody of the property: *Ex parte Union Bank of Manchester* ('). No notice was given of the agreement to Rothwell, Love & Co. before the bankruptcy. The result is that the goods were in the order and disposition of the bankrupt as reputed owner, free from any equitable charge, with the consent of the owner of the charge. And, as to stoppage *in transitu*, the transit was at an end when the goods reached the Poplar Dock Station. The test is this: "In what capacity are the goods held by him who has the custody? Is he the buyer's agent to keep the goods? or the buyer's agent to forward them to the destination intended at the time the goods were put in transit?" *Benjamin on Sales* ('); *Valpy v. Gibson* ('); *Dixon v. Baldwin* ('). Here the railway company were in possession as warehousemen, not as carriers. There is no evidence of any actual stoppage *in transitu*.

[They referred also to *Meux v. Jacobs* ('); *Ex parte Banner* ('); *Shepherd v. Harrison* (').]

**Horne Payne*, in reply: The bankrupt could not [42 be in possession of a charge on the goods with the appellant's

(1) 2 Ch. D., 291.

(2) 1 Ex. D., 285.

(3) Law Rep., 12 Eq., 354.

(4) 2d ed., p. 703.

(5) 4 C. B., 337.

(6) 5 East, 175.

(7) Law Rep., 7 H. L., 481.

(8) 2 Ch. D., 278.

(9) Law Rep., 5 H. L., 116.

consent, if he was not in possession of the goods themselves with his consent.

[JAMES, L.J.: That amounts to saying that the reputed ownership clause does not apply to equitable interests.]

The transit of the goods continued up to Shanghai, and indeed it is not ended yet, for the bills of lading are still in the shipowners' hands. The goods had not been, and could not have been, delivered to any one at the time when the appellant demanded the bills of lading: *Coates v. Railton* (').

JAMES, L.J.: Notwithstanding the length of time which has been occupied in the argument, and the great number of very nice points of law which have been raised, I am satisfied that the case ought to be determined simply upon the last point raised. Independently of any right which the vendor had under the agreement, he had his original vendor's right of stoppage *in transitu* when his purchaser failed, and there is nothing in the agreement, nothing in any bargain between him and the purchaser, to take away or diminish that right of stoppage *in transitu*. Then the question is, Has he stopped the goods *in transitu*? I am of opinion that in truth and in fact the transit did continue, and was intended to continue, all the way from the railway station in Yorkshire, through the docks in London, and on board the ship up to Shanghai. It is quite clear that the bargain between the vendor and the purchaser, for reasons essential to the interests of the vendor, was that that should be the transit, and that was the transit actually made from the one place to the other. By railway and ship the goods were to reach Shanghai, and by this time, subject of course to the perils of the sea, they have reached Shanghai. It is said that the transit was interrupted, and that in some way a right to end it accrued to the purchaser which destroyed the vendor's right to stop *in transitu*. Certainly this was not so when the goods reached the packer's hands. The 43] packer was employed by the vendor *to pack the goods, and when they arrived at the railway station in London, no doubt the railway company, being both warehousemen and carriers, said to the purchaser: "We hold the goods at your disposal." But the goods were marked "Shanghai," and were sent to the company for the purpose of being delivered by them to the Gordon Castle, and in that very advice-note in which they ask the purchaser for orders, and say, "We hold the goods at your risk," they add this, "Will be sent to the Gordon Castle." Therefore

(') 6 B. & C., 422.

it is quite clear they must have received notice at that time that the Gordon Castle was the proper destination, and the goods themselves were marked with the word "Shanghai." Therefore that was the rightful course, the course which the goods ought to have taken, and we must consider that the rightful course was intended to be taken, and was taken, that is, to send the goods on to Shanghai. Of this I am quite certain, that, if the vendor had found out that the goods were going to be sent anywhere else, that they were going to be diverted from the ship bound to Shanghai, he could have applied at once to the Chancery Division of the High Court, and would have been entitled to obtain, and would have obtained, an injunction to prevent the goods being sent in any other mode or to any other place. That, therefore, being the *transitus*, has it been stopped? It so happens, luckily for the vendor, that the documents of title have never left the shipowners' possession, they are found in their possession owing to the freight not being paid. The goods were in their possession when the bankruptcy commenced, and no one has acquired any right to take them out of the shipowners' hands, and while they are on board the ship with no valid right in any one to take them out of the shipowners' possession, the vendor comes to the shipowners and says, "Deliver the goods to me," and the shipowners have undertaken to sell the goods and hand over the proceeds of sale to the real owner. I am of opinion that the goods have been effectually stopped *in transitu*, because the shipowners are to sell them and deal with the proceeds according to the legal and equitable rights of the parties. If the vendor had gone out in time he could have stopped the goods *in transitu* before they were delivered out of the ship at Shanghai, but he is relieved from that trouble by the fact of the shipowners being here, and saying, We will sell them for the rightful owner. I am of opinion that there *was a right to stop *in transitu*, [44 and that there has been *de facto* a stoppage *in transitu*, which completes the title of the owner of the goods, who has sold them to a person who has become bankrupt since he delivered them. That, I think, is sufficient to dispose of the real point in the case.

There is really nothing in the other points which have been argued. We are all clearly of opinion that this agreement is not within the Bills of Sale Act. The point has been very much argued, and we think it right to say that, having regard to the words and the spirit of the Bills of Sale Act, a contract of this kind is not "a bill of sale or

other assurance of personal chattels whereby the grantee or holder has power to seize or take possession of any property" within the meaning of the act. It gives a right connected with the vendor's lien, but it is certainly not a bill of sale of personal chattels within the meaning of the act.

The other point was as to reputed ownership. If the case depended upon that, it is quite clear that the bankrupt was the true owner of the goods, but he was the true owner of them subject to an equitable charge, and certainly, in my opinion, that equitable charge could have been impeached by reason of there being nothing whatever to show that the owner of the goods was not the owner of them absolutely free from any incumbrance. That is to say, the true owner of the equitable charge or equitable interest is bound to show that the actual possessor of the goods is in some way prevented from holding himself out to the world as being the owner of them free from any trust, incumbrance, or charge. It seems to me that the appellant's case, if it depended upon that, would have failed. However, it is sufficient to say that he has succeeded upon the question of stoppage *in transitu*.

BAGGALLAY, J.A.: I am of the same opinion. So far as the duration of the *transitus* is concerned I am quite unable to distinguish the facts of this case from those of *Rodger v. Comptoir d'Escompte de Paris* (¹). There it was held that the *transitus* continued so long as the goods were in the charge of a third party who had been contracted with as carrier for the purpose of forwarding them. Applying the decision in that case to the present case, it would follow 45] that these goods *would have remained *in transitu* until such time as they had arrived at Shanghai, and were delivered over there by the shipowners. It has, however, happened, by reason of the bills of lading never having been sent from England, that there was no person in Shanghai to whom the goods could have been delivered, and consequently they remained in the possession of the carriers, and the *transitus* was therefore not completed. Before the *transitus* was completed, if indeed it has yet been completed, an arrangement was come to by all the parties, that is, the trustee of the bankrupt, Watson, and the shipowners, that the goods should be sold, and the proceeds disposed of according to the rights of the parties as they existed at the time when the agreement was entered into. I think, therefore, that the goods have been in substance stopped *in transitu*.

(¹) Law Rep., 2 P. C., 393.

BRAMWELL, J.A.: I am entirely of the same opinion, and for the same reasons. The only observation I wish to make is upon the question of stoppage *in transitu*. Undoubtedly the goods have been stopped *in transitu* if the *transitus* lasted until the goods reached Shanghai. Now, what are the facts? The goods are in the possession of Copperthwaite, an agent of Watson, the seller, and by the direction of the bankrupt, the purchaser, they set out on a journey which was to begin at Bradford and end at Shanghai, where they were to be delivered to a firm who would have been under an obligation to Watson if he had thought fit to give them notice of his rights. The goods set out on that journey, and no further instructions were required, nor was anything further necessary from the beginning to the end of the journey, except the procuring of the bills of lading and so forth. It seems to me, if there is any reason in the doctrine of stoppage *in transitu*, the *transitus* in this case was from Bradford to Shanghai, and, as Sir Richard Baggallay has said, I cannot distinguish this case from *Rodger v. Comptoir d'Escompte de Paris* (¹).

Solicitor for appellant: *Walter Webb*.

Solicitors for trustee: *Murray, Hutchins & Co.*

(¹) Law Rep., 2 P. C., 393.

See *Rucker v. Donovan*, 13 Kans., 251, 19 Am. Rep., 84, 87 note; *Stubbs v. Lund*, 5 Am. Dec., 65 note.

The consignor's right of stoppage *in transitu* is a mere equitable lien and not a right of property: *Dows v. Cobb*, 12 Barb., 310, 319; *Rucker v. Feiferlich*, 13 Kans., 251.

The right of stoppage *in transitu* is regarded with favor, and the engrafting of further restrictions upon the rule governing it, is not warranted by public policy: *Calahan v. Babcock*, 21 Ohio St. R., 281.

The vendor may exercise the right of stoppage *in transitu* as to part of the goods, though another portion of the goods have come to the possession of the vendee: *Buckley v. Furniss*, 17 Wend., 504; *Tanner v. Scovill*, 14 M. & W., 28; *Burr v. Wilson*, 13 U. C. Q. B., 478.

See, however, *Wait v. Scott*, 6 Grant's U. C. Chy., 154.

The right of stoppage *in transitu* is extinguished only by the actual and complete delivery of the goods consigned to the vendee, or to some agent of and for him: *Calahan v. Babcock*, 21 Ohio St. R., 281.

In the absence of an express or implied understanding to the contrary, the employment of a carrier by a vendor of goods on credit constitutes all middlemen, into whose custody they pass, agents of the vendor, for their transportation and delivery; until the complete performance of which duty the goods consigned are deemed to be *in transitu*: *Calahan v. Babcock*, 21 Ohio St. R., 281.

The delivery of goods by the seller to a carrier by the order of the buyer's agent, for the purpose of being forwarded to the buyer, is not such a constructive delivery to the buyer as to put an end to the seller's right of stoppage *in transitu*.

Although it seems to be the better opinion that if the buyer actually takes possession of his goods before their arrival at the place of their ultimate destination, the seller's right of stoppage *in transitu* is thereby defeated; yet a mere demand by the buyer, before such arrival, without any delivery, will not have that effect.

C., the agent of M., bought some lead of the plaintiff at Newcastle which

was shipped by C.'s order, to be forwarded to M. in London. Upon the vessel's arrival in the Thames, the lead was demanded by M., but the captain refused to deliver it; it was put on board a lighter belonging to the defendants, who were warehousemen, and who had undertaken the delivery of the lead by his orders; while still on board the lighter it was demanded by the plaintiff: Held, that at the time of such demand his right of stoppage still existed: *Jackson v. Nichol*, 2 Arnold's Rep., 82.

The transfer of goods, consigned in the usual general terms, by a vendor on credit, from the coaches of a carrier by railway to a freight depot or warehouse at the station designated for their discharge, in the vicinity of the vendee's place of business, there to await the payment by him of the charges thereon, does not, *ipso facto*, constitute a delivery thereof: but will be deemed the reasonable exercise of a right and duty by the carrier in the course and furtherance of their transit, referable to and in virtue of his original employment by the vendor, not as an act of, but as precedent to delivery: *Calahan v. Babcock*, 21 Ohio St. Rep., 281.

The vendor's right of stoppage *in transitu* does not cease on the arrival of the goods at the port of delivery, until they have come to the vendee's actual possession or his constructive possession, by a delivery to his agent: *Mottram v. Heyer*, 5 Denio, 629.

A vendor's right of stoppage *in transitu* is not terminated by the goods coming to the hands of a shipping agent appointed by the vendee, though they are delivered to him to await further directions in respect to the time and mode of shipment to the vendee at an ultimate destination previously fixed and not to be affected by such subsequent directions. The transit continues until the goods come to the possession of the vendee, or of some agent authorized to act in respect to the disposition of them, otherwise than by forwarding them to the vendee: *Harris v. Pratt*, 17 N. Y., 249; *Buckley v. Furniss*, 17 Wend., 504.

The entry of the goods by the vendee at the custom house, without the payment of the duties, is not a termination of the *transitu*; although, if

placed in a public store, under the warehousing system, it would be: *Mottram* and others *v. Heyer*, 5 Denio, 629; *Tanner v. Scovill*, 14 Mees. & Welsb., 27; *Burr v. Wilson*, 13 U. C. Q. B., 478; *Lewis v. Mason*, 36 U. C. Q. B., 590; *Ascher v. Grand Trunk*, 36 U. C. Q. B., 609.

See, however, *Wiley v. Smith*, 1 U. C. App. Rep., 179, affirmed 2 Can. Sup. Ct. R., 1, reversing 27 U. C. Com. Pl., 1, and *Wilds v. Smith*, 41 U. C. Q. B., 138.

The right of stoppage in transit ceases when the goods are bonded and deposited in a warehouse, in the joint custody of the purchaser or consignee, and the custom house authorities under the present warehouse system.

The following rules may be deduced from the authorities, and the settled principles applicable to stoppage in transit:

1. Where the goods are removed "under general orders" to the government warehouses, in default of an entry, the right of stoppage in transit is not terminated.

2. Where a formal entry is made, but is not followed up by proper bonding, the right continues.

3. Where there is a perfect entry, and the goods are thereupon regularly bonded and warehoused, the right ceases: *Fraschieris v. Henriques*, 6 Abb. Prac. Rep., N. S., 251.

The seizure of goods *in transitu*, at the suit of the vendee's creditors, does not extinguish the right of stoppage; and the vendor on credit may maintain an action for them or their value against the officers making the seizure: *Calahan v. Babcock*, 21 Ohio St. Rep., 281; *Rucker v. Donovan & Feiferlich*, 13 Kans. Rep., 251; *Durgy, etc., v. O'Brien*, 123 Mass., 12; *Inslee v. Lane*, 57 N. H., 454.

It has been held that the right of stoppage *in transitu* is lost to a vendor, if he allows a sheriff (who had seized the goods before they came to the vendee's possession, under process of attachment issued at the suit of creditors of the vendee) to sell them under execution without a claim or demand being made for them by the vendor prior to the sale.

A demand for the proceeds, while in the sheriff's hands and before paid over to the creditors, is too late as an

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assertion of the right of stoppage *in transitu*.

Had the vendor demanded the goods prior to the sale, *semble*, that he could have adopted the sale and have recovered the proceeds: *Carey v. Ellis*, 2 Labatt's Dist. Ct. Rep. (Cal.), 140.

The assignee in trust for creditors of the insolvent vendee is not a purchaser for value, and takes subject to the exercise of any right of stoppage *in transitu* which may exist against his assignor: *Harris v. Pratt*, 17 N. Y., 249.

In order to exercise the right of stoppage *in transitu*, no actual seizure of the goods before delivery to the vendee is essential. A demand of the carrier, notice to him to stop the goods, or a claim and endeavor to get possession, is sufficient: *Rucker v. Donovan & Feilerlich*, 18 Kans., 251; *Ascher v. Grand Trunk*, etc., 36 U. C. Q. B., 609. See, however, *Childs v. Northern*, etc., 25 U. C. Q. B., 165.

Such demand must be made of the one in possession of the goods: *Rucker v. Donovan & Feilerlich*, 18 Kans., 251.

W. B. Palmer purchased goods from the plaintiffs in England, which were shipped at Liverpool, in fifteen packages, in the name of M. & Co., the plaintiffs' shipping agents, as consignors, consigned to W. B. Palmer & Co., at Hamilton. These goods arrived in three different lots at Hamilton, between the 29th November and 4th December. On the 23d November W. B. Palmer & Co. indorsed the bill of lading to McPherson & Co., as security for a debt, and, between the 6th and 10th December, the goods were delivered to them by defendants.

The plaintiffs had a branch house at St. John, N. B., which, having heard of W. B. Palmer & Co.'s insolvency, telegraphed to defendants at Hamilton on the 5th December: "Do not deliver earthenware from our English house to W. B. Palmer & Co. Hold to our order." Signed, "Clementson & Co.," (the plaintiffs).

W. B. Palmer & Co., had then about 400 pieces of goods in defendants' warehouse at Hamilton, and the plaintiffs' names were not on any of the papers in defendants' possession, nor were the packages so marked that they could be identified.

Held, that the notice was insufficient.

The bill of lading, headed "Montreal Ocean Steamship Company, Allan Line, and Grand Trunk Railway of Canada," stated that the goods were to be delivered at Portland, "unto the Grand Trunk R. W. Co., and by them to be forwarded thence by railway to the station nearest to Hamilton," &c. Held that this bill of lading, not having been superseded by any other document, was in force up to the time of its indorsement to McPherson & Co.; and, *semble*, that such indorsement, though for an antecedent debt, would defeat the right of stoppage *in transitu*: *Clementson v. The Grand Trunk R. W. Co.*, 42 U. C. Q. B., 263.

Where goods are conveyed by a carrier by water, and deposited in the carrier's warehouse for the convenience of the vendee, to be delivered out as he should want them; held that the *transitus* was at an end, and the vendor's right to stop *in transitu* gone, although it appeared that the carrier claimed to have a lien on the goods: *Allan v. Gripper*, 2 Crompton & J., 218, 222 note, *Johnson & Co.'s* ed.

S., a debtor of Y., gave him an order for goods on W., who owed S. nothing. S. failed; afterwards Y., not knowing the failure, presented the order at W.'s store, received part of the goods; the remainder was made up in packages and promised to be sent to Y.'s house, who receipted for them to W. W., having learned of S.'s failure, could retain the goods for his lien on them for the price.

There was not such delivery as vested title in Y.; there was but an agreement to deliver.

That there was a written order or that Y. was ignorant of the insolvency of S. was immaterial: *Wannemaker v. Yerkes*, 70 Penn. St. Rep., 443.

In March, 1872, the plaintiff, a merchant at Orillia, gave to D., the travelling agent of defendants, who were merchants at Montreal, an order for certain goods, amongst which were 500 kegs of nails at \$3.80 per ton, which D. accepted; the goods to be delivered monthly during the season or sooner if required by the plaintiff, at six months' credit. In May following, after all the goods except the nails had been delivered, the plaintiff was burned out, in consequence of which he became insolvent, and so notified his creditors,

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giving them a statement of his assets and liabilities, and offering them a composition of sixty cents on the dollar, which they accepted, and a deed of composition and discharge was executed, the composition being payable by instalments at certain stated periods, the plaintiff to give his creditors his promissory notes for the said instalments, and to assign to a trustee certain policies of insurance and other securities for the due payment of the instalments, but on the payment of the instalments at the times specified the creditors were to release the plaintiff from all their claims. Neither at the meeting of the defendants' creditors, or at the time the deed was executed, was any mention made of the plaintiff's intention to require the performance of the contract as to the nails, nor did he include it as one of his assets, either in his statement delivered to his creditors, or in the schedule attached to the deed.

There was contradictory evidence as to a rescission of the contract in fact, but the jury found there had been none. The plaintiff having subsequently sued defendants for non-delivery of the nails, held by this court, and affirmed on appeal, Draper, C.J., of appeal, dissenting, that the evidence showed a rescission in law of the contract, the conduct of the plaintiff having been such as to justify the defendants in the belief that he intended to abandon it upon his insolvency, and there being evidence that the defendants, in such belief, likewise abandoned it: *Bingham v. Mulholland*, 25 U. C. C. P., 210.

A. & Co. purchased goods in England from B., a broker, which were shipped to them per G. T. Ry., to be delivered at L.

While the goods were being transported A. & Co., becoming insolvent, determined not to receive the goods, and wrote B. to that effect, who immediately recognized the act, acknowledged the retaking of the goods, and sent out a power of attorney to two parties to act for him. In the meantime, and while the goods were in charge of the G. T. Ry., the defendants in these suits obtained judgments against A. & Co., and placed writs against the goods of A. in the hands of the sheriff of S. D. and G., who seized the goods at Cornwall, some 300 or 400

miles from the place of delivery. Upon an interpleader between B. the vendor in England, and the execution creditors of A., held that the declining to receive the goods by A., in the course of delivery, and the immediate statement of that effect coupled with B.'s retaking of the goods as soon as advised, vested them in B., who was therefore entitled to succeed. The right of stoppage *in transitu* did not arise: *Dow v. Law*, 12 U. C. C. P. Rep., 461.

Goods were sold by G. to B. in New York, to be paid for on delivery at Milwaukee by B.'s acceptance of two drafts for the price, to be drawn on him by G. Before the property reached Milwaukee B. left that place, after instructing his agent to inform G. that he would not receive the same, and to return it to G. if it should arrive. The property reached Milwaukee, and drafts being drawn on B. for the price, they were returned without acceptance:

Held, that no title to the property vested in B., and that he had no interest therein which was subject to levy and sale on execution against him:

Held, also, that a sale of the goods by B. to another, did not carry a right of action for a previous conversion; and that the purchaser could not maintain trover against the sheriff, without a demand: *Hicks v. Cleveland*, 39 Barb., 537.

The defendants sold some wheat to the plaintiffs, which was to be shipped and forwarded to them, and by the contract of sale the plaintiffs, upon receipt of the invoice and bill of lading, were to transmit a banker's draft to the defendants for the amount.

The wheat was shipped, and the invoice and bill of lading forwarded to the plaintiffs, but they, instead of a banker's draft, transmitted an acceptance of their own for the amount; whereupon the defendants stopped the wheat in the hands of the carrier, and resold it to another party: Held that, even supposing the right of *property* in the wheat had vested in the plaintiffs, as the right of possession had not (by reason of the non-payment by them according to the contract), they could not maintain *trover* for the conversion of the wheat by the defendants: *Wilmshurst v. Bowker*, 2 Arnold's Rep., 91.

[5 Chancery Division, 46.]

C.J.B., Nov. 6, 18, 1876 : C.A., Feb. 22, 1877.

**Ex parte* GOOD. *In re* ARMITAGE. [46]*Release of one Joint Debtor—Ostensible Partner—Surety—Proof in Bankruptcy—Rejection by Trustee—Delay—Bankruptcy Rules, 1870, rr. 72, 73, 287, 313.*

J. gave to a bank a guarantee for £1,000 in favor of A. & Co., representing at the same time to the bank manager that he was a partner in that firm, but that he wished the fact of his partnership to be kept secret. The guarantee described him as a partner in the firm. Some time afterwards A. alone, as A. & Co., filed a liquidation petition; and the bank tendered a proof in the liquidation for advances which they had made to A. & Co. after the guarantee. After this the bank sued J. at law for £5,659, alleging him to have been a partner with A. J. filed a bill in chancery to restrain the proceedings in the action, denying the alleged partnership. A compromise was entered into between the bank and J., by which £2,818 was paid to them in satisfaction of their claim against J. and of a claim which they made against S., who had also given them a guarantee on behalf of A. & Co. J.'s guarantee was given up to him, a receipt for £1,000 being indorsed on it by the bank manager "in payment and discharge of the within guarantee, and also of all claims against J. in reference to or in connection with A. & Co.":

Held, by the Court of Appeal, that J. must be taken to have been an actual partner with A., but that the receipt did not operate to release J. so as to preclude the bank from maintaining a proof against A.'s estate.

Per BACON, C.J.: Though a creditor has a right to sue jointly with his debtor a person who has held himself out as a partner with the debtor, yet, as between themselves, the ostensible partner is a surety only, not liable to contribution, and therefore a release of the ostensible partner by the creditor does not release the debtor.

The bank's proof was sent to the trustee in December, 1872. In December, 1875, he gave notice that he rejected the proof, alleging as an excuse for the delay that he had only recently discovered the facts which justified the rejection:

Held, by BACON, C.J., that it was too late for the trustee to give such a notice, but that he ought to have applied to the court to expunge the proof.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

In the month of August, 1870, John Armitage, who was about to engage in business as a shoddy manufacturer at Dewsbury, was desirous of obtaining a credit of £1,000 from the Halifax Joint Stock Banking Company. The bank refused to give him this credit unless he could procure them a guarantee for the amount. *Thereupon [47 he induced John Smythies to give the required guarantee, and on the 23d of August, 1870, he and John Smythies went together to the bank and had an interview with Mr. John Fisher, the manager. According to Fisher's evidence it was then represented to him by Armitage and Smythies that they were about to enter into partnership, but Smythies said that he particularly wished that his name should not be disclosed, and requested that it might be kept secret.

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Smythies denied that he made any such representations to Fisher, and denied also that he was ever in fact a partner with Armitage. The following guarantee was, however, signed by John Smythies:—

“Halifax, 23d August, 1870.

“To the Directors of the Halifax Joint Stock Banking Company.

“Gentlemen,—In consideration that you will open a banking account with John Armitage and John Smythies, of Bradford Road, Dewsbury, and make advances to them, and give credit to them by discounting bills or otherwise, I hereby guarantee the payment of the balance which may, on the closing of such account, be or become due to you from the said John Armitage and John Smythies, individually or in partnership with any other person or persons, to the extent of £1,000. And I agree that, in default of payment of the balance due on the said banking account by the said John Armitage and John Smythies, you shall be at liberty, if you think fit, to receive and place to the credit of such account all such moneys, whether in the shape of payments, compositions, dividends, or otherwise, as may be recovered from the said John Armitage and John Smythies, or from their estate, or from any collateral securities, and, after giving credit for the same, the balance that may then remain shall be recoverable under this guarantee, and any liabilities you shall be under by reason of your having put your names to any bills or in any way guaranteed the same for the said John Armitage and John Smythies may be reckoned as part of such balance, notwithstanding such liabilities may at the closing of the account be outstanding. But it shall not be incumbent on you to enforce any payment from the said John Armitage and John Smythies, or from their estate, or from any collateral securities, before requiring me to pay the balance 48] due on *closing the account, which account you shall be at liberty to close whenever you may think proper; nor shall you be prejudiced by making any arrangement or composition you may think proper with the said John Armitage and John Smythies without first obtaining my consent thereto. And this guarantee is to extend to the Halifax Joint Stock Banking Company for the time being, of whomsoever composed, and to the house or firm of John Armitage and John Smythies as John Armitage & Co., of whomsoever it may consist. I am, gentlemen, your obedient servant,

(Signed)

“John Smythies.”

After this, advances were from time to time made by the bank to John Armitage & Co.

On the 8th of October, 1870, another guarantee in a similar form for £2,000 was given to the bank by one Joseph Smythies in favor of the firm of John Armitage & Co.

On the 11th of November, 1872, John Armitage as John Armitage & Co., filed a liquidation petition signed by himself alone, and not stating that he had any partner.

The first meeting of the creditors was held on the 4th of December, 1872, and a resolution was passed to liquidate by arrangement; a committee of inspection was appointed, Mr. J. D. Good was appointed trustee, and the immediate discharge of the debtor was granted. On the same day the bank tendered a proof for £4,229 7s., to which no objection was then made, and they voted in respect of it at the meeting. The bank in the meantime pressed John Smythies for payment, claiming much more than the amount of the guarantee, and on the 2d of May, 1873, they issued a writ against him alone to recover the sum of £5,659 16s. 3d. On the 27th of June, 1873, John Smythies filed a bill in the Court of Chancery, praying that the action might be restrained, and that the guarantee might be delivered up to be cancelled or otherwise rectified according to the true intention of the parties. The bill denied that there was any partnership between Armitage and John Smythies, and charged fraud. The court granted an injunction on the terms that the plaintiff should pay the sum claimed into court, which he did on the 16th of September, 1873. A compromise of the action was entered into between John Smythies and the bank, by which the bank consented to take the sum *of £2,818 9s., part of the money in court, in [49 satisfaction of their claim against John and Joseph Smythies, though the latter was not a defendant to the action. A receipt was indorsed on the guarantee of John Smythies in these words, "Received the 16th of September, 1873, from the within named John Smythies the sum of £1,000 in payment and discharge of the within guarantee, and also of all claims against him in reference to or in connection with John Armitage & Co. (Signed) John Fisher." A receipt in similar terms for £1,818 9s. was indorsed on the guarantee of Joseph Smythies. On the 1st of September, 1873, the bank sent to the trustee a further proof against the estate of John Armitage & Co. for £1,430 9s. 3d. This proof was not then objected to. Pending these proceedings, some among the other creditors of John Armitage & Co. conceived suspicions that a partnership had subsisted between John

Armitage and some other persons, and in particular the two Smythies. John Armitage himself was interrogated, but he denied that he had had any partner. Ultimately the committee of inspection, by a resolution dated the 18th of December, 1873, instructed their solicitor, Mr. Ibberson, to investigate this question of partnership. Several meetings took place, and ultimately Mr. Ibberson put himself into communication with Mr. Fisher, who referred them to Mr. Franklin, the then solicitor of the bank. About the same time similar inquiries were pushed by Mr. Hemingway, who was acting for the West Riding Bank, and an action was commenced against John Smythies, which was afterwards stayed. At length the committee of inspection, conceiving that they would be able to establish a partnership between both the Smythies and Armitage & Co., commenced an action against the Smythies in the name of one Jubb, a creditor of the firm of John Armitage & Co., to recover the sum of £89 3s. 2d. This action came on for trial on the 3d of August, 1875, at the assizes at Leeds, but before the trial was concluded the following arrangement was come to, and an order of the court was made that the parties thereto acting for the plaintiff, viz., the trustee, Mr. Ibberson, Mr. Walker, and others, should use their best endeavors to bring about an arrangement on the terms "that the defendants shall pay to the trustee £2,000, and to the plaintiff £600 for costs, which the scheduled creditors shall accept 50] in full discharge of all the scheduled *claims and of all demands and costs against the defendants." If these terms were not accepted by the scheduled creditors on or before the 12th of September, 1875, the defendants were not to be bound to pay the £2,000 and £600, but in lieu thereof they were, on or before the 19th of September, 1875, to pay to the plaintiff in the action the sum of £89 3s. 2d. claimed and £550 for taxed costs in satisfaction of all claims. There was also a provision that, in the event of the compromise not being agreed to and the lesser sum being paid, the arrangement was to be regarded as a compromise and not as an admission of liability. The creditors, however, accepted the terms offered, and the action was settled. It was at this trial on the 3d of August, 1875, that the trustee and the committee of inspection learned for the first time the precise terms on which the previous action by the bank against John Smythies had been settled on the 16th of September, 1873. In December, 1875, the trustee gave notice to the bank that their proofs sent in in 1872 and 1873 were rejected. The bank thereupon served upon the trustee a

notice of motion that the proofs should be admitted. The judge held that the trustee was not estopped by any laches from rejecting the proofs of the bank. He was also of opinion that it was established by the evidence that a partnership had in fact subsisted between Armitage and the two Smythies, or at any rate, between him and John Smythies, and that therefore the bank, by releasing John and Joseph Smythies, had also released Armitage. His honor, therefore, affirmed the decision of the trustee rejecting the proof, and dismissed the application of the bank. The bank appealed to the chief judge. The appeal was heard on the 6th of November, 1876.

De Gex, Q.C., and *West*, for the appellants: Our first objection is that the trustee was too late in rejecting our proofs. The first was formally admitted at the first meeting of the creditors, and we voted in respect of it. The second proof was sent to the trustee in September, 1873. He did not give his notice of rejection until December, 1875. This was too late: Bankruptcy Rules, 1870, rr. 72, 73, 313; *Ex parte Kemp* (*). The trustee ought himself to have applied to the court to expunge the proofs.

*Our main contention is that the release of the [51] Smythies did not release Armitage. It is clear that John Smythies held himself out to the bank as a partner with Armitage, and therefore he was liable to them as such. But there is nothing to show that there was any partnership in fact: it is expressly denied by Armitage and John Smythies. The reason why the release of one of two joint debtors operates to release the other is that, if the one who has not been released is sued, he has a right to enforce contribution from the other, and if that right remained the release would not be a complete one. Consequently it has been held that if the one is released the other is thereby also released. But this reasoning does not apply to the case where a man is jointly liable with another only because he was an ostensible partner, for in such a case the other debtor would have no right to enforce contribution from his ostensible partner. The reason for the rule not existing, the rule does not apply. The county court judge founded his decision upon *Nicholson v. Revill* (*), but that was the case of a discharge of one of three persons who had given a joint and several promissory note. The reason of the general rule is clearly explained by Patteson, J., in *North v. Wakefield* (*). In construing the alleged release the court will regard the

(*) 42 L. J. (Bkcy.), 26.

(*) 4 A. & E., 675.

(*) 13 Q. B., 536, 541.

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intention (*Watters v. Smith* (')), which in the present case was clearly only to release the Smythies. The receipts on the guarantees do not amount to more than covenants not to sue. *Webb v. Hewitt* (') rightly understood, is not against us.

BACON, C.J.: It would be merely idle to decide the case on the first objection. This would lead to further delay, for the trustee would only have to adopt a new form of procedure.

Winslow, Q. C., and *E. C. Willis*, for the trustee: The original agreement with the bank was clearly a joint one.

[BACON, C.J.: It is not an uncommon thing for a creditor to take a separate security from one partner.]

On the evidence we contend that an actual partnership between Armitage and the two Smythies, or, at any rate, between him and *John, is established. The bank ought to have proved the debt in the liquidation as a joint one, and in proving it as a separate one only they have acted in bad faith. In their second proof they make no mention of the sum they were to receive from the Smythies, and they say that they have no security for their debt. *Nicholson v. Revill* (') is in our favor. It is true that, where an intention is manifested by a creditor who releases one of two joint debtors not to release the other, the courts have construed the release as amounting only to a covenant not to sue, but the intention must be clearly manifested. In the present case there was no reservation of the rights of the bank against Armitage; quite the contrary. In *North v. Wakefield* (') there was an express reservation. In *Ex parte Slater* (') it was held that a proof in the bankruptcy of one joint debtor, after receiving a composition from the other, must be expunged. In *Watters v. Smith* (') the receipt given was not in full satisfaction. As between John Smythies and the bank it is clear that the bank intended that there should be a complete end of the matter, to discharge him altogether.

De Gez, in reply, referred to *Price v. Barker* (').

1876. Nov. 13. BACON, C.J., after stating the facts in substance as above, continued: The contention of the trustee before the county judge, under these circumstances, was that a partnership had existed between John Armitage and John Smythies, and that the terms of the receipt given by the banking company to John Smythies amounted to a release of the

(1) 2 B. & Ad., 889.

(2) 3 K. & J., 438.

(3) 4 A. & E., 675.

(4) 13 Q. B., 536, 541.

(5) 6 Ves., 146.

(6) 4 E. & B., 760, 777.

joint debt, and that the right to prove against the estate of John Armitage, one of the joint debtors, had become thereby forfeited. The learned judge adopted this view of the case, and held that Armitage and Smythies were partners, and, overruling the objection of the bank, founded on the length of time which had elapsed since the proofs had been admitted without dispute, he dismissed the bank's motion with *costs, on the ground that the bank, by releasing one [53 of the partners, had lost their right of recourse against the estate of the other.

Now, after considering the facts as they appear in the evidence and are admitted, I must say that I am unable to concur in the judgment which has been pronounced. Armitage and John Smythies have each of them deposed that *de facto* there was no partnership at any time between them, and their statements are in no respect contradicted. The conduct of the trustee and the committee of inspection corroborate the fact so stated. If there had been such a partnership it would have been the duty of the trustee to keep distinct accounts of the joint estate of the partnership which came to his hands, and of Armitage's separate estate, and to have administered those estates according to the rights of the several creditors. It does not appear that he did anything of the kind. It seems that he and the committee of inspection had a notion from the beginning that Smythies was jointly liable with Armitage in respect of some, if not all, of the debts which were admitted to proof. That Smythies was so liable to the banking company, although he was not a partner, does not admit of doubt, but, until about three years after the liquidation petition, the trustee took no steps to enforce any right against Smythies, and when he at length did so by means of the action in the name of Jubb, that action was compromised, the trustee thereby obtaining from Smythies a sum which was carried to the estate of Armitage.

If the case depended wholly upon the point arising out of the delay of the trustee, I should be of opinion that it was covered by the decision of the Court of Appeal in *Ex parte Kemp* (1), and I think it would be not only at variance with that explicit decision, but would be a most dangerous relaxation of the rules and the course of procedure in bankruptcy, to permit trustees to delay the performance of that which they must know to be their plain duty, upon the ground that they had no sufficient information on which they could proceed. The trustee and the committee in

(1) 42 L. J. (Bkey.), 26.

the present case might, by examination of Armitage and Smythies, and of the manager of the bank, and by other means, have satisfied themselves of the truth of the case.

54] *I am unwilling, however, to dispose of the appeal before me upon that ground. Nor have I thought it necessary to entertain the appellants' objection (although I think it is well founded), that the trustee ought, if he thought he had ground for disputing the proofs, to have applied for an order to expunge them. I therefore suggested to the appellants that it would be better to proceed with the case upon the materials which were before the judge of the county court, inasmuch as the appellants' success on the objection, which is technical merely, would only lead to further delay and expense, without determining the real question between the parties, and on both sides this suggestion has been adopted.

The real question is whether or not the appellants have lost their right to maintain their proofs by reason of the receipt which was given to Smythies upon the banking company receiving the sum which was paid by him in September, 1873. In considering that question, I cannot adopt the conclusion that any partnership existed between him and Armitage. A partnership can only be formed by contract between the parties—a *consensus* is indispensable. I find it in this case proved that there was no such *consensus*. That Armitage and Smythies had contemplated a partnership may be taken as established by the evidence of Mr. Fisher, but that they ever carried that intention into effect, what were the terms of the partnership, in what shares, or for what duration, there is not only no evidence, but there is no statement or explanation applicable to the subject. That they contracted joint liabilities is clear beyond doubt; but the difference between a partnership proper and such representation or dealing as would make a man jointly liable with another is palpable. In the one case, no matter what was the extent or nature of his interest, he is liable, without limit or qualification, to all the creditors of the partnership. In the other he is liable to all the persons who may have given credit to his representations, or may have acted in the belief occasioned by his conduct that he was a partner. In the one case he is a principal debtor. In the other, although as much liable as if he were a principal debtor, he is only liable as between himself and the person with whom he has permitted his name to be used and his credit to be engaged in the character of a surety, and no action for contribution by the principal debtor against

*him could possibly arise. In the judgment appealed [55 from, this distinction has not been observed, and yet, as it appears to me, it is of essential importance in considering the effect of what has been called a release of the joint debt.

Now, in point of law, it is not to be disputed that a release to one of several joint debtors releases them all. The case of *Nicholson v. Revill* (') is one of the many instances in which this rule of law has been applied, and the reason upon which the rule is founded is as clear and as plain as the rule itself. It is to prevent circuity of action, inasmuch as if the released debtor were still liable to an action for contribution by his co-debtor (who had been sued and had paid), he would not be in fact released: *North v. Wakefield* ('). But this principle has no application to the present case; for Armitage, being by the resolution of the creditors released from all his debts, could neither sue himself nor could his trustee sue on his behalf, even if the supposed partnership had existed, although the rights of the joint creditors against the other joint debtor would be unaffected by the bankruptcy by sect. 50 of the Bankruptcy Act, 1869.

But, although the general rule as to releases given to joint debtors, whether partners or not, is such as I have stated, each particular release is to be construed according to the plain intention of the parties: *Watters v. Smith* ('). Now what was the manifest intention of the parties here? The banking company had proved against Armitage's estate for the whole amount of their debt, and their proof had been admitted, and Armitage was by the resolution of the creditors discharged. The bank was content to accept from John Smythies, and he was willing to pay £1,000, the amount mentioned in the guarantee. The validity and effect of the guarantee was a subject of litigation between the bank and Smythies, and, without adverting to the grounds alleged by Smythies in his bill, and on which he founded his title to relief, it cannot be disputed that the construction of the instrument itself was open to question, although, even if it were to be read only as a security limited to £1,000, the representations made by Smythies to the bank manager might establish as against Smythies a liability jointly with Armitage *for the whole balance [56 due on the banking account. These questions between them being open, the bank, having proved against Armitage, and having released him, are content to take from Smythies the whole amount mentioned in the guarantee in full discharge

(') 4 Ad. & E., 675.

(') 13 Q. B., 536, 541.

(') 2 B. & Ad., 889.

of all that they could claim against him. It would, in my opinion, to use the words of the Lord Chief Justice in *Waters v. Smith* (¹), be "contrary to the intention of the parties, and wholly unjust," to hold that in the existing circumstances it was the intention of the banking company to do more than to limit their claim against Smythies to the £1,000 mentioned in the guarantee, and, upon receiving that sum, to forego any further claim against him in respect of any liability he might be under, or that the intention of Smythies was to do any more than to give up his contention as to the guarantee (which he had filed a bill to set aside) upon the condition that the bank would undertake not to sue him in respect of any claim arising out of their dealings with John Armitage & Co.

I am, therefore, of opinion that the order of the county court ought to be discharged, and that an order ought now to be made upon the trustee for payment of the dividends upon the two proofs which have been admitted, and that the appellants' costs, as well in the county court as of this appeal, should be paid by the trustee.

From this decision the trustee appealed. The appeal was heard on the 22d of February, 1877.

Winslow, Q.C., and *E. C. Willis*, for the appellant, contended, upon the evidence, that an actual partnership had existed between Armitage and John Smythies.

De Gex, Q.C., and *West*, for the bank.

THE COURT (Jessel, M.R., James, L.J., and Baggallay, J.A.) held, upon the evidence, that the bank were estopped from saying that there had not been an actual secret partnership between Armitage and John Smythies, and that for the purpose of the appeal it must be taken that an actual partnership had existed.

57] **De Gex*, Q.C., and *West*, for the bank: Our proofs ought not to be rejected altogether: Bankruptcy Rules, 1870, r. 287. We are entitled to prove against the joint estate, if any. The trustee ought to keep separate accounts of the joint estate, and of the separate estate of Armitage. It may turn out that there is nothing but joint estate.

But we contend that the receipt on the guarantee did not operate as an absolute release of John Smythies; it is nothing more than a covenant by the bank not to sue him. In construing such an instrument the court always has regard to the intention of the parties, and the surrounding circum-

(¹) 2 B. & Ad., 889.

stances: *North v. Wakefield* ⁽¹⁾; *Watters v. Smith* ⁽²⁾. The reason of the rule that the release of one joint debtor releases the other is explained by Patteson, J., in *North v. Wakefield*, to be that, if it was not so, the other, if sued, would have a right to enforce contribution from the first, and he would not be completely released. If there is no such right of contribution the general rule does not apply.

[JESSEL, M.R.: Is there any authority for saying that an actual release of one of two joint debtors does not necessarily release the other, there being no reservation of the right to sue the other? You must, at any rate, show an intention to reserve that right. I believe that the rule had its origin in the old feudal rule that the release of one joint tenant operated to release the other. It is very dangerous for modern judges to endeavor to find modern reasons for these old rules.]

The rule cannot go to this extent, that the release of one joint debtor necessarily releases the other; if it did, the release of a surety would release the principal.

[JESSEL, M.R.: Would not that be the result at law if it did not appear on the face of the bond that he was only a surety?]

This document is in form only a receipt, and it cannot be conceived that the bank intended to deprive themselves of the proofs which they had already made against the estate of Armitage.

Moreover, the liquidation petition had been filed before the receipt was given, consequently at that time the bank had no *right to sue Armitage, they had only a right [58 to share in the distribution of his estate.

[JESSEL, M.R.: The liability had been severed; there was no longer any joint liability.]

The solvent partner would have been entitled to have the joint estate administered before the bank had recourse to him. As to the £2,000 recovered in Jubb's action, the bank have never insisted that they have any right to share in that.

Winslow, Q.C., and *E. C. Willis*, for the trustee: Fisher in his affidavit in support of the bank's proof, swore that Armitage alone was indebted to the bank. The trustee was right in rejecting such a proof. No doubt a joint creditor may come in and prove in the separate liquidation of one of the partners, but he must come in as a joint creditor, and not representing himself to be a separate creditor. If the bank are only allowed to prove now, they will have to give

⁽¹⁾ 13 Q. B., 536.

⁽²⁾ 2 B. & Ad., 889.

credit for what they have already received on account of their debt.

[JESSEL, M.R.: It appears that the estate only amounts to £1,600 besides the £2,000 recovered in Jubb's action.]

Watters v. Smith (1) is distinguishable. The principle of the rule is that by the release of one joint debtor the debt is gone: *North v. Wakefield* (2); *Nicholson v. Revill* (3); *Webb v. Hewitt* (4); Coke upon Littleton (5). We contend that the receipt operated as an accord and satisfaction of the whole debt. At any rate, the bank cannot be entitled to share in the £2,000 recovered in Jubb's action, as they had already compromised with both the Smythies.

JESSEL, M.R.: The main point we have to consider is, what was the effect of the receipt given by Mr. Fisher on behalf of the bank on the 16th of September, 1873,—did it operate to release the estate of Armitage, which was then in liquidation, from the claim of the bank? It appears to me that that was not its operation. After all, this is not a release properly so called, that is, a release by deed; it is 59] *in form a receipt, and, like all other documents not under seal, it must be construed with reference to the surrounding circumstances, of which there is evidence not contradicted. Now what were those circumstances? Armitage had filed a liquidation petition, and a proof had been made by the bank against his estate, which at that moment was not disputed though it had not been formally admitted. The bank had brought an action against John Smythies, who had filed a bill in equity to restrain the action, disputing his liability, disputing the fact of partnership, and disputing the alleged representation of partnership,—disputing his liability altogether. Then the action was compromised by the bank taking a sum of money equivalent to 10s. in the pound on their claim. Now what is the meaning of compromising with Smythies? Surely it means to compromise the dispute with him, leaving the bank's claim against Armitage's estate in the liquidation untouched. The claimants never intended to do more than to take as much as they could get from Smythies towards their demand, and when we look at what they did, and at the form of the receipt, I think it is pretty clear that nothing more was intended. It is, "Received this sum of money in payment and discharge of the within guarantee"—it is a specific guarantee—"and also of all claims against him in

(1) 2 B. & Ad., 889.

(2) 13 Q. B., 536.

(3) 4 Ad. & E., 675.

(4) 3 K. & J., 438.

(5) 232 a.

reference to or in connection with John Armitage & Co." Now what is the meaning of these words? Why it was alleged by the bank, first, that he was a partner with Armitage, and, secondly, that whether he was so or not he had held himself out as being a partner. That was the nature of their claim against him. It was in reference, therefore, to that dispute. That is the meaning of it; we are compromising the dispute with you for this sum of money; but the very nature of it shows that they only had in their minds an intention to compromise their claim against him, and not to destroy the proof which they had already made against the estate of Armitage. In fact, when we look at the surrounding circumstances of the case they appear to me stronger than those in any of the cases which have been cited, in some of which certainly instruments in writing were construed most favorably for the creditor, having regard to the manifest intention of the parties as evidenced by the surrounding circumstances. The bank, therefore, are entitled to retain their proof.

*The remaining question is, what is to become of [60 the £2,000 which was obtained in the action brought in the name of Jubb against the two Smythies? It is not really claimed by the bank, and, if it was, I think the claim could not be substantiated, because they had already compromised with the two Smythies, and therefore they could not possibly claim a share of money afterwards obtained from them. That would have been a gross breach of faith, and it appears to me that such a claim could not have been maintained. Therefore, though the proof is admitted, the £2,000 obtained from the two Smythies in Jubb's action must be set apart and applied only to the debts of the other creditors, irrespective of the bank, leaving the other creditors and the bank to go against the remaining assets.

The only other question is that of costs, and as to this we think that the order of the chief judge should be discharged, and that, looking at the circumstances under which this claim was brought forward originally, and the kind of evidence by which it has been sought to be maintained, the right course will be to give no costs to the bank, either in the county court or before the chief judge or in this court, and to allow the trustee his costs out of the general estate, that is, the estate exclusive of the moneys recovered from the Messrs. Smythies.

JAMES, L.J.: In the view which we take of the case it is not necessary to keep distinct accounts of the joint and

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separate estate. It will all be dealt with as it originally stood.

BAGGALLAY, J.A.: I agree.

Solicitor for trustee: *C. Walker*, agent for J. Ibberson, Dewsbury.

Solicitors for bank: *Layton & Jaques*, agents for Watson & Dickons, Bradford.

See 20 Eng. R., 340 note; 19 Eng. R., 647 note; 17 Eng. R., 184 note; Id., 246 note; 8 Eng. R., 390 note; *Holden v. Reed*, Smith's N. H. Rep., 278, 282 note.

The recovery of judgment against a wrongdoer, without satisfaction, does not vest title in him to the property converted. Nor is such judgment a bar to a recovery against one converting the property after the conversion for which the first recovery was had: *Atwater v. Tupper*, 45 Conn., 144.

A purchaser at an auction sale of real estate, who, in accordance with the terms of sale, has paid to the auctioneer a portion of the purchase price, may, upon failure of the vendor to convey a perfect title as agreed, maintain an action to recover his deposit, either against the auctioneer or the vendor, or both, and is entitled to interest from the time of a demand for the money, and a refusal to pay. He is entitled, however, to but one satisfaction; and a recovery and satisfaction of the judgment against either the vendor or auctioneer will discharge the other.

Where, therefore, in an action against the vendor, plaintiff failed to prove a demand and so was refused interest, held that the satisfaction of said judgment was a bar to an action against the auctioneer, although in the latter action proof was given of a demand and refusal: *Cockcroft v. Muller*, 71 N. Y., 367.

A release of one of two or more joint debtors, whether they are bound jointly or jointly and severally, discharges the original contract as to all; and may be pleaded in bar of an action on the contract. But the release, to have this effect, must be a technical release under seal. A covenant not to sue one of the joint obligors or promisors, does not amount to a release, but is a covenant

only. It does not at law discharge either of the joint obligors or promisors; and a suit may, notwithstanding such covenant, be brought upon the original contract against all, if it was a joint contract, or the one to whom the covenant was not given, if the contract was joint and several: *Frink v. Green*, 5 Barb., 455.

A release and discharge of one joint debtor, without a consent by the other to a severance, and an agreement by him to a severance, or otherwise to pay the residue, operates to release and discharge both: *Bronson v. Fitzhugh*, 1 Hill, 185; *Bouchand v. Dias*, 3 Den., 238, 241, and cases cited; *Kasson v. Rease*, 44 Barb., 347; *Line v. Nelson*, 38 N. J. Law Rep., 358; *Cocke v. Jenner*, Hob., 66; *Mr. Sumner's note to Rees v. Berrington*, 2 Ves. Jr., 544.

A release of one of several joint wrongdoers or contractors discharges all, except when all are parties to the release and covenant in it to remain liable, and then the action should be on the new agreement: *Bronson v. Fitzhugh*, 1 Hill, 185.

And this, notwithstanding the act of 1838 (Laws 1838, p. 243), unless the release be qualified by reference to the act, and show it to be intended to operate thereunder, and as therein provided: *Bank v. Ibbotson*, 5 Hill, 461.

An action was brought against three persons as joint tort-feasors. Pending the suit the plaintiff executed to L., one of the defendants, a release under seal, in which it was declared that it was not to prejudice or impair the plaintiffs' claim against the other two defendants. The release was executed in consideration of \$500, and in terms released and discharged L. from all claims of every description for damages accruing or accrued by reason of the

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wrongs complained of; the plaintiffs thereby acknowledging themselves "to be fully paid and satisfied for all and singular the trespasses complained of" by them in the suit then pending against the three defendants jointly. Held, 1. That the release inured to the benefit of all the defendants, and was a bar to the action. 2. That the proviso in the release, by which the right to recover, for the same injury, against the other defendants was attempted to be reserved to the plaintiffs, was simply void, being repugnant to the legal effect and operation of the release itself: *Gunther v. Lee*, 45 Maryland, 60; *Rubb v. Turner*, 2 Hen. & Munf. (Va.), 88; *Bronson v. Fitzhugh*, 1 Hill, 185.

In New York, by statute, it is provided, Laws 1838, p. 248, 4 Edm. St., 451.

§ 1. Whenever any copartnership firm shall be dissolved by mutual consent or otherwise, it shall and may be lawful for any one or more of the individuals who was or were embraced in such copartnership firm, to make a separate composition or compromise with any one or all of the creditors of such copartnership firm; and such composition or compromise shall be a full and effectual discharge to the debtor or debtors making the same, and to them only, of and from all and every liability to the creditor or creditors with whom the same is made or incurred by reason of his or their connection with such copartnership firm.

By section 2, as amended in 1845 (Laws 1845, p. 410), it is provided:

§ 2. Every such debtor or debtors making such composition or compromise, shall take from the creditor or creditors with whom he may make the same, a note or memorandum in writing, exonerating him or them from all and every individual liability incurred by reason of such connection with such copartnership firm, which note or memorandum may be given in evidence by such debtor or debtors under the general issue, in bar of such creditor's right of recovery against him or them; and if such liability shall be by judgment in any court of record in this state, then on a production to and filing with the clerk of such court, the said

note or memorandum in writing, duly acknowledged, by the party or parties making the same, in the same manner as satisfaction of judgment is now required by law to be acknowledged, such clerk shall discharge said judgment of record so far as the said compromising debtor or debtors shall be concerned.

The 8d and 4th sections provide:

§ 3. Such compromise or composition with an individual member of a firm, shall not be so construed as to discharge the other copartners, nor shall it impair the right of the creditor to proceed at law or in equity against the members of such copartnership firm as have not been discharged; and the member or members of such copartnership firm so proceeded against, shall be permitted to set off any demand against said creditor or creditors which could have been set off had such suit been brought against all the individuals composing such firm; nor shall such compromise or discharge of an individual of a firm, prevent the other members of such firm from availing themselves of any defence at law or equity, that would have been available had not this act been passed, except that they shall not set up the discharge of one individual as a discharge of the other copartners, unless it shall appear that all were intended to be discharged.

§ 4. Such compromise or composition of an individual of a firm with a creditor of such firm, shall in nowise affect the right of the other copartners to call on the individual making such compromise, for his ratable portion of such copartnership debt, the same as if this law had not been passed.

Many of the other states have similar statutes.

In order to operate as a release under the act of 1838, it must be qualified by a reference to that act, and show it was intended to operate thereunder, and as provided by it: *Bank v. Ibbotson*, 5 Hill, 461, 463.

A release executed to one of several joint covenantors in a charterparty, absolute in its terms, and containing no reference to the "act for the relief of partners and joint debtors," passed April 18, 1838, does not fall within the provisions of that act.

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Such a release is to be construed with reference to the common law. And viewed in that light, it is a discharge of all the joint covenantors: *Hoffman v. Dunlop*, 1 Barb., 185.

It must be under the act of 1888 to so operate: *Bolen v. Crosby*, 49 N. Y., 187.

For other cases under the statute, see *Bennett v. Buchan*, 61 N. Y., 222, reversing 53 Barb., 578; *Moss v. Jerome*, 10 Bosw., 220; *Stitt v. Cass*, 4

Barb., 92; *Oakley v. Aspinwall*, 1 Duer, 80; *Fowler v. Perrin*, 16 Upper Can. Com. Pl., 258.

If a release be intended to operate under the statute as a release of one joint debtor, but by mistake appropriate language be not used, it may be reformed in equity. So such a mistake may be set up as an equitable defence to the operation thereof: *Fowler v. Perrin*, 25 U. C. Q. B., 227, 238.

[5 Chancery Division, 61.]

C.A., March 1, 1877.

61] *Ex parte GARRARD. In re LEWER (¹).

Trust Fund—Assignment—Notice—Priority—Trustee himself an Assignee—Practice—Time for Appealing—Bankruptcy Appeal—Rules of Court, 1875, Order LVIII, rr. 9, 15—Bankruptcy Rules, 1870, r. 143.

W. and A. were appointed joint receivers in a partnership suit, and were ordered (after payment of costs) to pay the residue of the moneys received by them to the partners according to their respective rights. L., one of the partners, afterwards assigned his share of the moneys to W., in consideration of advances made by him. After this L. signed an order to W., requesting him "to pay the balance of money due to me" to G. W. accepted this order in writing, undertaking thereby to pay "the balance due to you" to G.:

Held, upon the construction of this acceptance, and upon the evidence, that "the balance" intended was the balance remaining after satisfying W.'s own claim.

Decision of Bacon, C.J., affirmed.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy, which is reported (¹).

As the judgment of the Court of Appeal proceeded upon a different ground, it is necessary to state a few additional facts.

It appeared that the sum of £697 1s. 11d., which Lewer owed to Wilkes when the order of the 6th of September, 1875, was given, was made up of sums amounting to £391 18s. which Wilkes had, in June and July, 1875, advanced to Lewer in anticipation of his share of the funds realized by the receivers in the chancery suit, and of a sum of £305 3s. 11d. which Lewer had collected on behalf of the partnership estate, and which he was unable to pay over to the account of the receivers. Wilkes, at his request, agreed to pay this sum for him upon his giving him the order of the 6th of September, and Wilkes paid the sum to the account of the receivers on the 14th of September.

(¹) Affirming 19 Eng. R., 698.

(²) 4 Ch. D., 101; 19 Eng. R., 698.

*Wilkes deposed that, when Lower requested him [62 to accept the order of the 18th of September in favor of Garrard & Bartram, the request made was for an order on the balance payable to Lower after satisfaction of Wilkes' own claim. Wilkes said that he then examined into the matter, and estimated that there would be, as Lower had already told him, a balance of between £1,200 and £1,300 coming to Lower when the suit was wound up, and that that would leave about £500 after satisfying Wilkes' own claim. Wilkes also said that Lower told him that he had informed Garrard & Bartram of the position of the matter, and of the advances which Wilkes had made to him. This latter statement was not contradicted by Garrard & Bartram. The debt due from Lower to Garrard & Bartram had been contracted before the order of the 18th of September was given by him.

Garrard & Bartram appealed from the order of the chief judge, which reversed the previous decision of the county court judge in their favor.

**Roxburgh, Q.C., E. C. Willis, and J. Henderson*, [63 for the appellants: Wilkes allowed the appellants to go on trading with Lower, and to contract fresh debts with him, concealing his own prior charge on the fund. He cannot, therefore, be allowed to avail himself of his charge as against them: *Troughton v. Gitley* (¹); *Ex parte Ford* (²).

[BAGGALLAY, J.A.: There is something more than standing by; there is a distinct promise by Wilkes to pay.

JESSEL, M.R.: It may be that there was no duty on his part to give you notice of his charge, unless you asked him the question. But here he has undertaken to pay the balance to you.]

They were stopped by the court.

De Gex, Q.C., and Finlay Knight, for Wilkes: The true construction of the order of the 18th of September and of the acceptance by Wilkes is, that there was an assignment to Garrard & Bartram only of the balance remaining of Lower's share of the moneys after satisfying the claim of Wilkes. The evidence proves that this was the intention of the parties, and that the appellants were informed by Lower of Wilkes' prior charge.

[JESSEL, M.R.: The whole question is, what is the meaning of the word "balance"? If a trustee holds personal estate on trust for sale, and to pay a share of the proceeds of sale to A., and he makes advances to A. before he realizes the estate, he is surely entitled, when he has realized

(¹) Amb., 630.

(²) 1 Ch. D., 521.

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it, to deduct those advances from A.'s share of the proceeds before making any payment to an assignee of A.]

Beresford, for the trustee.

Roxburgh, in reply.

64] *JESSEL, M.R.: I think that the decision of the chief judge is right. The simple question is, what do the written documents mean? and when we see what the facts were, their meaning is perfectly plain. Wilkes and Arliss were appointed joint receivers in the partnership suit, and they were bound to pay over to Lewer his share of the moneys received by them. Wilkes advanced to Lewer £697 on account of what was coming to him from the receivership account, and obtained from him an authority to the receivers to pay over his share to himself. It did not in form amount to a charge on the moneys, but, having been given for value, it was irrevocable. As between Wilkes and Lewer, all that was due to Lewer was the balance after deducting the £697. Then Lewer goes to Wilkes and tells him that the amount coming to him will be about £1,200, and says that he wishes to charge the balance, after satisfying Wilkes' own claim, with the payment of the debt which he owed to Garrard & Bartram. Then the two documents of the 18th of September were signed. The first speaks of the "balance of money due to me for goods supplied." It is clear that that means the balance of the £1,200 after payment of the £697 to Wilkes, which would be about £500 or £600. And the acceptance by Wilkes speaks of "the balance collected by me and due to you for goods supplied;" and he adds, "I estimate the balance at about £500." It is plain that Wilkes, when he gave that acceptance, understood that he was to pay over to Garrard & Bartram the balance remaining after deducting what was due to himself. Garrard & Bartram did not take any steps to ascertain what the real amount of that balance was, but they took the security for what it was worth, as they took it in respect of a debt which was already due to them. Wilkes undertook to pay over to them this balance, and he is ready to do so now. I can see no pretence for making him pay anything more.

JAMES, L.J.: I am of the same opinion. Lewer assigned to the appellants the balance coming to him from Wilkes, and Wilkes undertook to pay to them that ultimate balance. 65] There is only a charge upon the *balance really due to Lewer after allowing for the advances which have been already made to him by Wilkes. There is no ground for disturbing the decision of the chief judge.

BAGGALLAY, J.A.: I was at first under the impression that this acceptance had been signed by Wilkes with the view of inducing Garrard & Bartram to give further credit to Lower. The evidence, however, and in particular the affidavit of Wilkes, upon which he has not been cross-examined, shows that the case is very different.

JAMES, L.J.: It is a very material fact that the statement of Wilkes that Lower told him that he had informed Garrard & Bartram of Wilkes' prior charge, is uncontradicted. The appeal must be dismissed with costs.

Solicitor for appellants: *J. Pettengill.*

Solicitors for Wilkes: *Vizard, Crowder & Co.*, agents for W. Adams, Plymouth.

Solicitors for trustee: *Walters & Gush*, agents for J. P. Pearse, Plymouth.

As to the liability of one accepting an order, payable on completion of certain work, to pay what shall be due, etc., in the future, see *ante*, p. 85 note; 17 Eng. Rep., 204 note; 12 Eng. Rep., 66 note; 14 Eng. Rep., 268 note; 7 Eng. Rep., 69 note; 18 Eng. Rep., 219-220 note.

A. was cultivating the farm of B. on shares: A. gave C., to whom he was indebted, an instrument in writing addressed to B., requesting him to pay a certain sum to C., "and take the same out of my share of the grain," meaning the grain then harvested or growing on the farm. B. wrote the words "Order accepted" on the back of the instrument and signed the same.

In an action by C. against B., held:

1. That the instrument, though not negotiable, is a bill of exchange.

2. That the order and acceptance are absolute; the words above quoted from the order not limiting its payment to a particular fund, or making it conditional, but merely indicating the means by which the drawer might reimburse himself.

3. That the drawee could not defend against the legal effect of the bill and acceptance, on the ground that, before such acceptance, he had already made advances to the drawer, solely on the faith of the share of grain belonging to the latter, more than sufficient to cover its full value, and that the facts were known to C., the payee, at the time of such acceptance: *Corbett v.*

Clark, 45 Wisc., 408, 407-411 and cases cited; *Ballou v. Boland*, 14 Hun., 855.

In *Munger v. Shannon*, 61 N. Y., 251, Gulick was a partner with Munger in the business of malting. She gave to Wilkin & Hare an instrument, which was indorsed to plaintiff, as follows: "Mr. Harrison Shannon,—You will please pay to Messrs. Wilkin & Hare the amount of a note for \$3,000, dated Dec. 31, 1868, and deduct the same from my share of the profits of our partnership business in malting. Note made by myself as principal, to the order of myself, and indorsed by Nathan Randall and Herrick Munger."

L. A. Gulick."

The defendant indorsed thereon, "Accepted Feb'y 6, 1869. H. Shannon."

It was held by the Commission of Appeals, Earl, Com., dissenting, that the writing was not a bill of exchange but an equitable assignment of sufficient of the profits to pay the note, which was irrevocable as soon as assented to by the defendant, so as to require him to appropriate the profits, if any, to its payment; but that he was not absolutely bound to pay, and the absence of profits was a good defence.

In speaking of this case, the Supreme Court of Wisconsin say (*Corbett v. Clark*, 45 Wisc., 410), "The case of *Munger v. Shannon*, 61 N. Y., 251, is essentially different from this case. The fund was in the hands and under the joint control of the drawer and drawee as copartners, and the order

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was drawn upon the drawer's share of the profits of the partnership business, which could not be ascertained without accounting and settlement."

It may be doubted whether the *distinction* drawn between the cases by the Wisconsin court is well founded, although there seems little doubt that the *result* arrived at by that court was correct. It may also well be doubted whether the case of *Munger v. Shannon* can be sustained upon principle or authority.

The defendant, the owner of a house in process of building, accepted an order drawn upon him by the contractor, in favor of the plaintiff, "to be paid when the house is finished." Neither the contractor nor the defendant finished the house, but it was sold by the latter in an unfinished state, and afterwards completed by the purchaser, the plaintiff doing some work upon it. Held that plaintiff was entitled to recover: *Robbins v. Blodgett*, 124 Mass., 279.

The court said, "The order contains no condition that it shall be finished by Willis. It is general in its terms, and is payable absolutely when the house is finished; and it is immaterial who completed it. If the defendant wished to limit his liability, he should have done so when he accepted the order: *Cook v. Wolfendale*, 105 Mass., 401; *Russell v. Barry*, 115 Mass., 300; see also *Somers v. Thayer*, 115 Mass., 163. When this case was before the court in 121 Mass., 584, the question was whether the house had been finished; that being a question of fact, the contract between Willis and the defendant was held to be admissible for the purpose of ascertaining whether the time had arrived when the order was payable. The time when the liability of the defendant accrued being dependent upon the happening of an event, that contract was clearly competent, as bearing on the question whether the time had arrived when the defendant became liable; but it is not competent to limit the extent, or change the character of the liability created in express terms by the order and acceptance."

The cases of *Risley v. Smith*, and *Schreyer v. Mayer*, cited 14 Eng. Rep., 268, are reported 64 N. Y., 576, and 66 N. Y., 656.

As to when an order or check operates as an assignment, see 7 Eng. Rep., 69 note; 12 Eng. Rep., 66 note; 14 Eng. Rep., 268 note; 18 Eng. Rep., 219 note.

It seems to be settled, that the mere drawing of a check, without presentation or acceptance by the drawee, does not operate as an assignment of so much of the drawer's funds in the hands of the drawee: *Caldwell v. Merchants' Bank*, 26 U. C. C. Pl., 294; *Lamb v. Sutherland*, 37 U. C. Q. B., 148; *Weinstock v. Bellwood*, 12 Bush (Ky.), 139.

See, however, *North v. Campbell*, 72 Ills., 380.

In the following cases it was held that a check upon a bank operates *from the time of presentment*, as an assignment of the funds of the drawer to the extent thereof, and that the bank could not afterwards otherwise apply such funds: *Fourth, etc., v. City, etc.*, 68 Ills., 398; *McGrady v. German, etc.*, 4 Mo. App. Rep., 330; *Zelle v. German, etc.*, 4 Mo. App., 401.

See *North v. Campbell*, 72 Ills., 380.

Otherwise, it seems in *Canada*: *Caldwell v. Merchant's Bank*, 26 U. C. C. Pl., 294.

A check drawn in the ordinary form, not describing any particular fund, or using any words of transfer of the whole or any part of any amount standing to the credit of the drawer, does not operate as an assignment, equitable or otherwise, of funds of the drawer in the hands of the drawee; and it is immaterial that the drawee is not a bank. An order, check or draft, to have the effect of an equitable assignment, must be drawn on a particular, *specified* fund: *Matter of Merrill*, 71 N. Y., 325, reversing 10 Hun, 604, and distinguishing several cases.

When A. deposits money in a bank, with directions that it is to be paid out on a check which he has given or will give to C., the money is still the money of A. until the bank either pays it, or promises C. to pay it, unless it be deposited at the instance or procurement of C., or under an arrangement with him: *Mayer v. Chatahoochee, etc.*, 51 Geo., 324.

An overseer of the poor gave defendant an order on the town treasurer for the amount due him for keeping a

pauper. Defendant transferred the order to the claimant, who notified the overseer thereof. Held that such notice was not sufficient as against a trustee process : *Thompson v. Downing*, 48 Verm., 646.

An order drawn on a particular fund and notice thereof to the payee operates as an equitable assignment thereof, and probably without notice : *Phoenix, etc., v. Philadelphia*, 38 Leg. Int., 176 ; *Ballou v. Boland*, 14 Hun, 355 ; *Lewis v. Berry*, 64 Barb., 593.

Though it has been held in Pennsylvania that a municipal corporation is bound to recognize an assignment of part of an executory contract for the payment of money, so as to pass an equitable right of action to the assignee : *Matter of Philadelphia*, 35 Leg. Int., 235 ; 86 Penn. St. R., 179.

W. went into the employment of the defendants under an arrangement by which he was to commence working for them, and to work whenever they had work for him, of which they were to give him notice, but nothing was agreed as to the length of time that he should continue in their employment. Before commencing work he assigned to A., by an order on the defendants, all money to become due to him while in their employ. This order was accepted by the defendants and put on record as required by the statute. Afterwards, and while W. was in defendant's employment, they were factorized as his debtors by one of his creditors. Held that the wages earned up to the time of the attachment could be held by A. under the assignment : *Harrop v. The Landers, etc.*, 45 Conn., 561.

Future wages, to be earned under an engagement not existing at the time, are not capable of being assigned : *Herbert v. Bronson*, 125 Mass., 475.

Ackerman & Son, who were at the time engaged in repairing a house for the defendant, who was then indebted to them thereon, in the amount of \$300, gave to plaintiffs the following instrument :

"Mohawk, Aug. 31, 1876.

Jerome Tuttle,—Pay Brill & Russell three hundred dollars, and charge the same to our account, for labor and materials performed and furnished in the repairs and alteration of the house in which you reside in the village of Mohawk. J. P. Ackerman & Son."

Held, that this did not constitute an equitable assignment of any money which might be due from the defendant to Ackerman, as there was no specification of any particular fund out of which it was to be paid : *Brill v. Tuttle*, 15 Hun, 239.

A. employed B. to collect a claim against the United States. Before its allowance, or the issue of a warrant for its payment, he drew in favor of C. an order on B., payable out of any moneys coming into his hands on account of said claim. B. accepted it, and D. became the holder of it in good faith and for value. A. refused to recognize its validity after the warrant in his favor had been issued, or to indorse the latter. D. thereupon filed his bill against A. and B. to enforce payment of the order.

Held, 1. That the order became, upon its acceptance, and in the absence of any statutory prohibition, an equitable assignment *pro tanto* of the claim.

2. That, under the act of Feb. 26, 1863 (10 Stat., 170, re-enacted in sect. 8477, Rev. Stat.), the accepted order was void, and that D. took no interest in the claim, and acquired no lien upon the fund arising therefrom : *Spofford v. Kirk*, 97 U. S. Rep. (7 Otto), 484.

[5 Chancery Division, 73.]

V.C.M., March 27, 28, 29; April 3, 4, 5, 10, 11; June 2, 1876: C.A., Feb. 21, 23, 24, 26, 1877.

73] *NEW SOMBRERO PHOSPHATE COMPANY V. ERLANGER.

[1872 N. 62.]

Syndicate—Promoter—Purchase by Company—Antecedent Contract—Agency—Fraud—Misrepresentation in Prospectus—Quorum of Directors.

A lease of an island in the West Indies containing extensive deposits of phosphate of lime was, on the 30th of August, 1871, contracted to be sold subject to the sanction of the court, to a person who was in fact the agent or trustee for a syndicate or group of speculators, and the contract was confirmed by the judge in chambers on the 15th of September. This agent, on the 20th of September, agreed to sell the property to a trustee for the plaintiff company, registered the same day, for double the price at which he had purchased, and which had been paid. The main object of the new company, as stated by the memorandum of association, was to acquire the lease of the island and work the phosphates. There were five directors, who were named in the articles of association. Of these, two were away from England when the company was formed, and took no part in the management till after the purchase was completed; another was the trustee who purchased on behalf of the syndicate; and another, by arrangement made before the registration of the company, obtained his share qualification by gift or loan from the principal member of the syndicate, who in fact directly or indirectly selected all the directors. The fifth was independent of the syndicate. The three last-mentioned directors, at a board meeting on the 29th of September, adopted the contract for purchase:

Held, by Malins, V.C., (1) that the syndicate must be considered to have purchased the property as from the 30th of August, and, therefore, that from that date they were at liberty to dispose of it as they thought proper; and that, inasmuch as there was no one who, as representing the future company, could then treat the syndicate as being in a fiduciary relation towards him, the company were not entitled to set aside the contract because there was no disclosure of the price at which the syndicate had purchased, or to say that the syndicate were trustees for the company of the difference between the two purchase-moneys: (2) that the fact that the principal or active member of the syndicate had, as early as the 12th of September, commenced negotiations with some of the persons who afterwards became directors with a view to the formation of the company, did not make the syndicate promoters or agents of the company: (3) that though the acceptance of the contract for purchasing the lease of the island was the principal object for which the company was formed, it [74] did not require more than the quorum to make it *valid: (4) that when the company had entered into possession of the property in pursuance of a contract made on behalf of the company by three of the directors named in the articles of association, it was not open to the company afterwards to object as against the vendors to the validity of the contract, on the ground that the three directors did not legally form a quorum of the body, or that one of the three was, as trustee for the syndicate, vendor, and, as director of the company, purchaser: (5) that the company was not entitled to set aside the contract on the ground that the prospectus, as framed by the syndicate, contained misstatements of the following nature, viz., that an erroneous inference had been drawn from the liquidator's statement as to results of the working of the phosphate on the island which gave a more favorable appearance than the facts justified: That an estimate of the amount of phosphate on the island, deduced from a survey, was referred to in a manner which made it appear as if the survey had been made for the purposes of the company, when it was in fact made several years before, since which time the phosphate had been extensively worked,

it not being shown that there was not still on the island the amount of workable phosphate mentioned in the survey: That it was stated that the directors had entered into a provisional contract for the purchase of a lease of the island, though all that had been done was that three out of the five members of the board had passed a resolution adopting, without investigation, a contract prepared before the formation of the company, and made between one of the three directors, the trustee for the vendors, and a nominee of the vendors, who acted as trustee for the future company.

Held, on appeal, that the syndicate, being the promoters of the company, stood in a fiduciary relation to it, and were bound to make a full and fair disclosure of their interest in the property; and that as they had suppressed the facts that they were the real vendors, and that they gave for the property only half what the company were going to give, and had obtained the acceptance of the contract from such a board as they created, and had inserted in the prospectus statements which would lead intending shareholders to believe that the contract had been approved by all five directors, there was no contract binding on the company, and the sale to the company must be set aside, and judgment given against the members of the syndicate for repayment of the purchase-money:

Held, also, that the estate of a deceased member of the syndicate was liable on the ground that he was a partner, and that the action therefore did not die with him.

Semble, also, that directors not being members of the syndicate were not liable.

In June, 1870, an order was made for winding up an unsuccessful company called the Sombrero Phosphate Company, Limited, and Mr. Chatteris was appointed official liquidator. That company *was entitled to a lease [75 for the residue of a term of twenty-one years, from the 16th of March, 1865, of the island of Sombrero in the West Indies, a small barren island containing large deposits of phosphate of lime. A reserved bidding for this lease was fixed at £55,000.

The lease was offered for sale by public tender on the 17th of July, 1871, but the only bid being for £20,000, no sale was effected. Shortly afterwards the defendant, Baron Emile Erlanger, who was a banker carrying on business at Paris and London, and several other persons, agreed to form a syndicate to purchase the property, if it could be obtained on what they thought reasonable terms. Ultimately it was arranged between Chatteris and a Mr. Westall, a solicitor who had taken part in introducing the concern to Erlanger, and now acted on behalf of the syndicate, that the syndicate should purchase for £55,000, which was the reserved price, and give £5,000 more for certain stores. Westall bargained that he was to receive £500 for his services in effecting the purchase, and this sum was afterwards paid him by the syndicate. The syndicate arranged to apportion the £60,000 purchase-money among themselves as follows:

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Julius Beer	£7,500
Louis Ferdinand Floersheim	3,500
Colonel Napier Sturt	360
Maurice Joseph Posno	900
William Morris and Frederick Vilmet	1,800
Alexander McEwen.	5,500
Raphael & Sons	2,000
Lionel Lawson	3,500
Thomas Westall (for Sir James Anderson and his other friends)	16,600
Emile Erlanger & Co.	18,340
	<u>£80,000</u>

Chatteris accepted the offer subject to the approval of the judge, and a provisional contract, dated the 30th of August, 1871, subject to the approval of the court, was entered into between Chatteris and John Marsh Evans, a paid agent of Erlanger, as the agent of the syndicate, which [76] contained, amongst other provisions, *one for paying a deposit of £5,500 at the time of signing it. This deposit was paid by means of a check of Emile Erlanger & Co. The agreement was not signed by Evans till the 11th of September.

On the 15th of September this provisional agreement was approved by the judge in chambers.

About the same time the syndicate determined to get up a joint stock company, to be called The New Sombrero Phosphate Company, for working the island. A memorandum and articles of association were accordingly prepared under the direction of the syndicate, Mr. Westall acting as their solicitor. Erlanger appeared to have been the principal agent in carrying out the whole of the transactions on behalf of the syndicate, the other members leaving him to manage them as he thought best. Some correspondence took place before the confirmation of the contract, from which it appeared that Erlanger had determined upon the formation of a joint stock company.

On the 20th of September, 1871, an agreement was signed by John Marsh Evans and by Francis Pavy on behalf of the intended company, which recited the agreement of the 30th of August, but without mentioning the price; and it was agreed that Evans should sell, and that Pavy should buy on behalf of the company, the lease and stores for £110,000, of which £80,000 was to be paid in cash and £30,000 in fully paid-up shares. The contract was expressed to be conditional on the company being registered before the time

fixed for completion, and on the contract being duly confirmed by the company. The time for completion was the 15th of November, 1871.

The company was registered on the 20th or 21st of September, 1871, and the memorandum of association, dated the 20th of September, 1871, stated the objects for which the company was established to be, amongst other things, "The purchasing or leasing and working of mines or quarries of phosphate of lime and other minerals or products of a like or similar nature in the island of Sombrero in the West Indies. The rendering marketable, manufacturing, transportation, and sale of phosphate of lime and other minerals or products of whatever kind obtained by such working. The acquiring, making, providing, maintaining, and using of buildings, *roads, railways, tramways, [77 canals, stock, plant and other works and conveniences for the purposes aforesaid, and otherwise in connection with the property, operations, or business of the company."

It also stated that the nominal capital of the company was £130,000 divided into 13,000 shares of £10 each.

The articles of association contained the following provisions:—

"19. The company may forthwith issue the 13,000 shares of £10 each, into which its nominal capital of £130,000 is divided, and may from time to time, with the sanction of a special resolution, increase the capital beyond the sum of £130,000 by the creation of new shares."

"65. The number of directors shall from time to time be determined by the company in general meeting. Until any other number is so determined, there shall not be less than four directors nor more than seven. The first directors shall be his excellency Monsieur Drouyn de Lhuys, E. B. Eastwick, Esq., the Right Hon. Thomas Dakin, John Marsh Evans, Esq., and Rear-Admiral R. John Macdonald."

"74. Every director shall vacate his office upon ceasing to hold in his own right the prescribed number of shares, or becoming bankrupt or suspending payment, or making any statutory arrangement or compounding with his creditors, or being found lunatic or holding any office or place of profit in the company, or being concerned or participating in the profits of any contract with the company, but no director shall vacate his office by reason of his being employed by the company or the board in any professional capacity, or as a manager of the business, or any part thereof, or of his being a director, or member, or shareholder, or otherwise interested in any company or partnership which has entered

into contracts with, or done any work for, the company; nevertheless he shall not vote in respect of such contract or work, and if he does so vote, his vote shall not be counted."

"82. In their management of the business of the company the directors may, without any further power or authority from the members, do the following things, viz. (amongst other things):

"They may adopt and carry into effect the contract for the assignment to the company, bearing even date herewith, 78] of the island of *Sombrero, in the West Indies, and the factory, buildings, and works thereon, for the residue of a term of twenty-one years from the 16th day of March, 1865, subject to the provisions contained in the lease thereof."

It was also provided that the quorum of the directors for the management of the business of the company should be three, and that the qualification of a director should be the holding fifty shares in his own right.

On the 20th or 21st of Sept. the balance of the £55,000 payable to Chatteris for the purchase of the lease and stores was paid.

Of the five directors named in the articles of association, M. Drouyn de Lhuys was resident in France, Mr. Eastwick was absent in Canada, Sir Thomas Dakin was the Lord Mayor of London, Evans was the agent of Erlanger and the party named as vendor in the agreement of the 20th of September. The precise nature of his connection with Erlanger did not appear further than that he was employed by him, and was to be paid for his services, and afterwards received as compensation from Erlanger 100 fully paid-up shares in the company. Macdonald, the fifth director, never took any steps to provide the money for the shares constituting his qualification, and it appeared that he never intended to do so. On the 28th of September he wrote to Erlanger, requesting that "for appearance' sake" he would allow some of Erlanger's shares to go into his name, to which Erlanger replied on the 1st of October: "It is quite understood that we lend you the fifty shares necessary for your qualification. Ludwig knows about this, and you can speak to him." This arrangement was carried out by an advance being made to Macdonald by Erlanger & Co. through Floersheim.

The first meeting of the board of directors took place on the 29th of September, 1871. There were present Sir Thomas Dakin (in the chair), Macdonald, and Evans. The minutes of this meeting showed that Westall produced the certifi-

cate of incorporation of the company, the contract of the 30th of August, and the agreement between Evans and Pavy dated the 20th of September, 1871.

It did not appear that the propriety of this agreement was in any way considered, or that it was compared with [79 the contract of the 30th of August; but a simple resolution was passed, apparently without debate, approving of it. Macdonald and Dakin, in fact, stated that the contract of the 30th of August was not produced at all at the meeting.

At the same meeting Mr. Westall was appointed solicitor to the company, and a resolution was passed for issuing a prospectus. This prospectus, after describing the company as the New Sombrero Phosphate Company, Limited, and stating the capital to be £130,000, divided into 13,000 shares of £10 each, gave the names of the directors as follows: "His excellency Drouyn de Lhuys, President of the Société des Agricultures de France; the Right Honorable Sir Thomas Dakin, Lord Mayor of London; E. B. Eastwick, Esq., C.B., M.P.; John Marsh Evans, Esq., Leamington; Rear-Admiral R. John Macdonald, 1 Ovington Square, London. Bankers: Messrs. Glyn, Mills & Co., Lombard Street, E.C. Solicitors: Messrs. Westall & Roberts, 7 Leadenhall Street, E.C. Auditors: Messrs. Price, Holyland and Waterhouse."

It contained the following amongst other statements:—

"This company is formed for the purpose of purchasing the island of Sombrero, in the West Indies, and working its well-known and important deposit of phosphate of lime. The island is held on lease granted by Her Majesty. The property formerly belonged to the Sombrero Company, which is now being wound up under the Court of Chancery. The sole cause of this liquidation was the insufficiency of capital, and the consequent forcing of the produce at unremunerative prices. This is proved by the following statement, which has been certified as correct by the official liquidator, Mr. H. Chatteris, under whose able management the island has been worked, and which shows the profit made in the ten months during which the cargoes received have been realized. The subsequent shipments will produce a still higher rate of profit; but as the account sales have not been closed, they are taken from the statement. The particulars of shipments annexed show that there were raised and shipped by the liquidator in ten months—July, 1870, to May, 1871—thirty-six cargoes of phosphate, producing 16,127 tons 3 cwt. 1 qr. 5 lbs., at prices varying from 85s. to 95s. *delivered in England, and from 40s. [80

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to 42s. 6d. free on board, and which produced net proceeds £38,960 3s.

“The cost of realizing this was £11,300 in cash, and in stores £4,579 2s. 8d. —in all		£15,879	2	8
“Leaving in hand a net profit at 28/7½ per ton for ten months		23,081	0	10
Or, per annum		27,697	5	0
“The present price, and which has been obtained by the liquidation, is, how- ever, £5 per ton, which would have produced in addition on the above returns		14,502	14	3
“Equal to an annual clear profit (sub- ject to £1,000 per annum for rent) of		£42,199	19	3

“In the above result, the basis of the present ratio of production under liquidation in chancery is taken, but with a sufficient capital, and the prudent management of experienced commercial men, this produce may be easily increased by 5,000 tons per annum, which would yield an annual profit of £50,000, after payment of rent and expenses of management. The results and figures of the ten months' liquidation have been carefully checked, and may be absolutely relied upon. A report, made after careful survey, estimates the deposit at 700,000 tons at the least, and for ten years there has been a steady and continuous supply proportionate to the labor and capital employed.”

The survey here referred to had, in fact, been made in 1864, and the report in 1865.

Then, after certain other statements, came the following clause:—

“The directors have entered into a provisional contract to purchase the property, including the lease of the island, as from 29th September, 1871, together with all buildings, plant, fixed or rolling stock, machinery, steam engines, lighters, &c., now at the island, complete and in full working order, for the sum of £110,000. Copy of this contract, which is dated 20th of September, 1871, and made between [81] John Marsh Evans of the one part, and Francis Pavy, on behalf of the company, of the other part, may be seen at the office of the company's solicitors.”

Evans, though described as of Leamington, was a mere visitor there, his real residence being at Paris.

The applications for shares were so numerous that at a board meeting of the 6th of October, 1871, 10,325 shares were allotted to the public, leaving only 2,675 to answer the 3,000 fully paid-up shares to be allotted to the syndicate.

At a board meeting on the 2d of November, 1871, at which were present Sir T. Dakin, Macdonald and Evans, Westall attending as solicitor, a resolution was passed to the effect that, the transfer of the island and property having been completed, a check for £80,000 should be forthwith drawn. The check for that sum was accordingly drawn and passed to Erlanger's firm, who distributed the money among the syndicate according to their interests.

The first ordinary general meeting of the company took place on the 2d of February, 1872. From shorthand notes of the proceedings it appeared that after the chairman, Sir T. Dakin, had made some preliminary observations, a shareholder, Mr. Stephenson, spoke to the following effect:—

"I am sure I am very much pleased with the statement you have submitted to the shareholders, but there are a good many rumors that are antagonistic to the company out of doors. I came to the meeting with a feeling of dissatisfaction, which your statement has allayed. I mention these rumors that you should have an opportunity of contradicting them. It is stated this company was not bought direct from the liquidator, but from a third party, an intermediate party between this company and the liquidator, bought one day at a little over £50,000, and within a few days afterwards sold to this company at £110,000. Now, if the directors entering into this matter were satisfied the thing was a good bargain at £110,000, I do not know that we have much to do with the matter except this: It is stated that one of our present directors was the buyer and the seller in this matter; and I think that is very material to us. I mention that, in order that I may ascertain whether one of our directors on this board was really the *man who [82 bought the company one day at £50,000, and within a short time afterwards was both buyer and seller at £110,000. I think if that was the case we ought not to sanction the continuance of the director on the board. I do not know the name."

The Chairman: "You allude to the gentleman named in the prospectus, Mr. John Marsh Evans."

The Shareholder: "I think it was an improper transaction that one of the directors should be both the buyer and the seller of the property. That requires a little explanation on the part of the board."

The chairman then made some remarks, in the course of which he stated that he had heard some rumors as the shareholder had, that he had made some inquiries, and he was told Mr. Evans bought this with other gentlemen fully a month before the company was thought of or projected, and he further stated as follows: "It appears to me the contracts between Mr. John Marsh Evans and Mr. Pavy, on behalf of the company, were stated in full in the prospectus, and all those persons who joined the company were invited to look at them. Whether it cost £50,000 or £100,000, I do not think is material to the question. It was not bought by one of our members. The gentleman was not a director then, but bought in concert with other people. What it was bought for I do not know."

The Shareholder: "Out of doors they say £55,000 was the sum paid for it."

Some more discussion took place, and the business was concluded with a vote of thanks to the chairman.

The annual general meeting of the company took place on the 19th of June, 1872, J. M. Evans in the chair, and the affairs of the company being in a very depressed state, resolutions were carried for the appointment of a committee of investigation, and the adjournment of the meeting to a period within six weeks. The adjourned meeting took place on the 29th of August, 1872, the committee of investigation having in the meantime presented a report, in which they recommended the removal of the directors and the appointment of fresh ones, and that the new board be authorized to take such proceedings in the name of the company as they might be advised, for the purpose of recovering back the difference between the two purchase-moneys.

83] *The board was accordingly reconstituted, and the new directors were authorized to commence the proceedings which resulted in the institution of the present suit.

As a preliminary measure letters were sent in September, 1872, in the name of the new chairman, to each of the members of the syndicate, requesting them to consider the matter, and inviting them to make some proposal for approval by the shareholders. In reply to one of these letters Baron Erlanger wrote repudiating all legal liability, but offering to give the company the benefit of the full amount of profit which his firm personally derived in cash and shares from the transaction. The other members of the syndicate however did not respond to the chairman's invitation.

The original bill was accordingly filed on the 24th of December, 1872, against Erlanger, Evans, Mrs. Westall (the

widow of James Westall, who had died pending these transactions), Dakin and Macdonald. Erlanger, by his answer to the original bill, submitted that the other members of the syndicate should be made parties to the suit. They were accordingly added by amendment, and by re-amendment one or two other persons who represented interests in the syndicate were also made parties.

The bill asked to have the contract of the 20th of September, 1871, set aside and delivered up to be cancelled, and for an order against such of the defendants as were members of the syndicate to repay to the company the £110,000 with interest at £5 per cent. per annum, the company offering to deliver up the island and account for the profits made by working it; and it asked in the alternative that the members of the syndicate might be ordered to repay £55,000, the difference between the price paid by the syndicate and that paid by the company. It also sought to make some of the defendants answerable for the profits made by them by dealing with the shares of the company on the Stock Exchange.

Dakin, by his answer, stated that the contract of the 30th of August was not produced at the board meeting on the 29th of September, and that he had never seen the contract, and only knew of its purport some time afterwards, and then only by report; *that he considered the contract [84 then approved of and confirmed to be that of the 20th of September. He also stated that he had acted under the belief that the statements in the prospectus as to the working of the island were true; but he admitted that he had approved of the contract without making any independent inquiry on behalf of the company as to the value or productiveness of the island, and he stated that what he had said at the meeting of the 2d of February was all he then knew about the purchase, and he did not then know at what price the property had been originally purchased.

The suit was heard before Vice-Chancellor Malins on the 27th, 28th and 29th of March, and on the 3d, 4th, 5th, 10th and 11th of April, 1876.

Higgins, Q.C., Davey, Q.C., and Alexander Young, for the plaintiff company: The defences raised by the several defendants throw the responsibility of the entire transaction upon Erlanger; and if it is once established that Erlanger was a promoter of the company, he and the other members of the syndicate were in a fiduciary position towards the company; and unless there was the utmost open dealing and the fullest disclosure between Erlanger and the com-

pany, the latter are entitled to set aside the purchase altogether.

Now it is clear that there never was any independent investigation as to the propriety of the purchase on the part of the company. The vendors were the syndicate who formed the company, had entire control over it, appointed the directors, and prepared the memorandum and articles of association.

The syndicate, or at least Erlanger, knew that on the 29th of September there was not a board competent to enter into a contract with them. Drouyn de Lhuys and Eastwick were both away. Evans was indirectly related to and the confederate of Erlanger, and was the nominal vendor. Admiral Macdonald was, as he admits, qualified by Erlanger, and therefore was not able to give an independent consideration to the subject. There remained, therefore, Sir T. Dakin as the only independent man who might be expected to protect the interests of the company, and he appears to have taken everything on trust. The resolutions of that *meeting were therefore passed by persons who in equity could not bind the company.

The facts show conclusively that Erlanger was the promoter of the company. It will perhaps be suggested that the law has been changed by *Gover's Case* (*), and that it is necessary to show that when the first contract was entered into the company was actually in course of formation. But *Gover's Case* only decided that an application by contributories to be relieved from liability on shares could not be granted on the ground that a contract was made with a person who afterwards became a promoter of the company, though some of the *dicta* may lend color to the argument sought to be founded on that case. Here the company was entirely the creation of Erlanger, and the inception of it must be carried back to the time of the purchase by the syndicate. The case must be treated as if Erlanger was upon the board. He names the directors. Evans' vote was really his, and so was Macdonald's. The contract was, therefore, in its essence and spirit, just as if it had been made by Erlanger, and in such a case it could not stand, because there was no disclosure to the public of the contract between Erlanger and the liquidator: *Aberdeen Railway Company v. Blaikie* (*), on which was founded *Imperial Mercantile Credit Association v. Coleman* (*). The principle upon which all such cases as these rest is clearly stated

(*) Law Rep., 20 Eq., 114; 1 Ch. D., 182.

(*) 1 Macq., 461.

(*) Law Rep., 6 H. L., 189.

by Mr. Justice Lindley⁽¹⁾. It was followed in *Phosphate Sewage Company v. Hartmont* (before Vice-Chancellor Malins on March 1, 1876), and in *Lindsay Petroleum Company v. Hurd*⁽²⁾. *Fawcett v. Whitehouse*⁽³⁾ shows that persons who act on behalf of others forming a company cannot obtain a profit for themselves out of the transaction. So also *Tyrrell v. Bank of London*⁽⁴⁾; *Charlton v. Hay*⁽⁵⁾; *Cornell v. Hay*⁽⁶⁾; *Beck v. Kantorowicz*⁽⁷⁾; *Great Luxembourg Railway Company v. Magnay*⁽⁸⁾; *Hichens v. Congreve*⁽⁹⁾. Then, again, though by the articles of association a quorum of three only was required to transact the ordinary business *of the company, that did not apply to an important [86 matter like the acceptance of the contract specially mentioned in the articles of association. That required the sanction of the entire board. But assuming that a quorum was sufficient, there was no quorum, for there was only one *bona fide* director at the meeting of the 29th of September. The directors were not all summoned, and there was no legal quorum, even assuming that there was no objection to the three directors who attended as individuals, *Kirk v. Bell*⁽¹⁰⁾; and the directors could not delegate their functions to a smaller number in so important a matter: *Howard's Case*⁽¹¹⁾. Again, there were important misrepresentations in the prospectus. Apart from the fact that the address of Evans is untruly given, there are three principal misstatements. First, the result of the workings during the liquidation is incorrectly stated so as to vitiate altogether the statement of profits. Secondly, the report as to the amount of phosphate in the island, which report every one reading the prospectus would imagine to have been made for the purposes of the company, was really made in 1865, since which time the island had been worked continuously for phosphates. Thirdly, it states that the directors had entered into a provisional contract for the purchase of the island for £110,000. Persons reading that statement would have a right to assume that the five directors named at the head of the prospectus had entered into the contract.

Cotton, Q.C., Fry, Q.C., and Ingle Joyce, for Erlanger: The plaintiffs have entirely failed to make out a connection between the purchase by the syndicate and the formation of the company. When the contract of the 30th of August

(1) Lindley on Partnership, 3d ed., pp. 595, 597, 599.

(2) Law Rep., 5 P. C., 221.

(3) 1 Russ. & My., 132.

(4) 10 H. L. C., 26, 32.

(5) 23 W. R., 129.

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(6) Law Rep., 8 C. P., 328.

(7) 3 K. & J., 230.

(8) 25 Beav., 586.

(9) 1 Russ. & My., 150, n.

(10) 16 Q. B., 290.

(11) Law Rep., 1 Ch., 561.

was made Erlanger clearly was not in a fiduciary position as regarded the company. No attempt has been made to carry back the inception of the company so far back as the 11th of September when Evans signed the contract, and there only remained the formal ministerial act of approval in chambers to make it complete. As regarded the syndicate, it was binding on the 30th. On the 16th of September Erlanger & Co. sent round to each of the persons associated in it a statement calling upon him to pay up his portion of the 87] *purchase-money, and on the 21st of September the balance of the purchase-money was paid.

It is clear that there was no agency for the company at first, and it has not been made out that Erlanger was an agent for the company when the contract was completed. An intention to form a company afterwards does not make a person an agent for constituting the company. The minutes of the meeting must be taken to be conclusive that the agreement of the 20th of September was approved by the company with knowledge of that of the 30th of August.

With regard to the alleged misrepresentations in the prospectus, the prospectus itself gave notice that the vendor was one of the directors. It gave every one the opportunity of looking at the contract of September, 1871, and therefrom learning of the existence of the previous contract; and if people will shut their eyes and go into a company without making inquiries, they cannot afterwards ask relief from the court. The fact of Westall being the solicitor for both parties was disclosed. The burden is upon the company to make out a case of misrepresentation, more especially when they were in possession of the island from October, 1871, and obtained at once information as to the state of things there, and it was not till the 2d of February, 1872, that the first steps were taken to question any of the transactions; and if the statement as to the result of the working was made *bona fide*, as there is no doubt it was, the contract cannot be set aside merely because that statement was inaccurate: *Kennedy v. Panama, &c., Royal Mail Company*(¹). As to the report of the quantity of phosphate remaining having been made in 1864, it is quite immaterial when it was made, provided that there is the actual quantity of phosphate on the island, and of that there is no doubt. Then the statement that the contract with Evans was made by the directors does not imply that every one of the directors took part in it. Even where the number of directors is fixed by act of Parliament this is unne-

(¹) Law Rep., 2 Q. B., 580.

cessary: *Thames Haven Dock Company v. Rose* (*). Then it is said there was no board. But there was, in fact, a valid board meeting according to the articles of association, by which the quorum was fixed at three. Granting that Evans *was disqualified, it was only from voting, not from [88 making a quorum of the board. It is said that Macdonald was also incapable of contracting, on account of having received his share qualification through Erlanger. But he did not take steps to have his qualification provided till after the first meeting, and it is obvious that no director is ever duly qualified at the first meeting of a company, which must take place before the allotment of shares. There was, therefore, no valid objection to Macdonald, and Dakin is admitted to have been duly qualified. *Kirk v. Bell* (*) was a case of a board not duly constituted.

The main question is, therefore, whether Erlanger entered into the original contract as the agent of the company. It is not necessary to contend that there can be no such thing as an agency for a company to be afterwards formed. But the agency here was entirely on behalf of the syndicate, not of the company. Though *Gover's Case* (*) may not be exactly in point, it covers the principle of this case. This case must be distinguished from those in which a contract is made for a particular sum, and there is a sub-contract that out of that the person sought to be charged is to receive something. That is fraud, and the present case is distinguished from those which were cited, because in all those cases there was a representation that the whole fund was to go to the first contracting party; and, in fact, some found its way to some other person. All the cases cited come within that position: *Fawcett v. Whitehouse* (*); *Hichens v. Congreve* (*); *Beck v. Kantorowicz* (*); *Tyrrell v. Bank of London* (*). But even if there are misrepresentations in the prospectus, there is nothing to connect Erlanger with them.

As regards the right to sell at an enhanced price, that turns on the question of agency; and that is illustrated by the difference between the positions of Erlanger and Pavy. Pavy entered into the contract before the company was formed, but he did so as the agent of the company. Erlanger, in what he did, was merely the agent of the syndicate. It is impossible to maintain that *when Erlan- [89 ger's agent bought the property on the 30th of August he

(*) 4 Man. & G., 552.

(*) 16 Q.B., 290.

(*) Law Rep., 20 Eq., 114; 1 Ch. D., 182.

(*) 1 Russ. & My., 132.

(*) 1 Russ. & My., 150, n.

(*) 3 K. & J., 230.

(*) 10 H. L. C., 26.

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did so as the agent of the company. *Foss v. Harbottle*⁽¹⁾ exemplifies the distinction between inviting the public to come in and purchase a property and asking them to come in and share the benefit of a bargain; and *Paul and Beresford's Case*⁽²⁾ shows that however short the space of time between the sale to the promoters and the sale to the company, if the two transactions are distinct, agency cannot be attributed, because one of the parties to the first scheme became a director of the company when formed.

The fact that the property was of a perishing character, was a reason why the company were bound to avail themselves of the earliest opportunity for opening up these transactions, and they had sufficient information in February, 1872.

Bristowe, Q.C., and Kekewich, for Julius Beer: The only case attempted to be made against Beer is that he gave authority to Erlanger to act on his behalf in the formation of the company. Beer was not in any view directly concerned in the contract, and even if it were set aside his position would not be affected. And on the whole, the cases cited, such as *Tyrrell v. Bank of London*⁽³⁾, are all cases of agents putting money in their own pockets which they ought to have shared with others.

J. Pearson, Q.C., and Romer, for several other members of the syndicate: There is no justification for bringing these parties before the court. No case has been proved against them, and if the company were bound to bring them before the court on Erlanger's objection, they were equally bound to prove against them the case on which they intended to rely.

Bristowe, Q.C., and W. W. Karlake, for Mrs. Vilmet, the executrix of Vilmet: As an executrix, Mrs. Vilmet is not liable to be sued for the wrong doing of her testator, if he did wrong: *Peek v. Gurney*⁽⁴⁾.

90] **Bristowe, Q.C., and Kekewich*, for Admiral Macdonald: The contract is not vitiated by the arrangement for providing the admiral's qualification, because there was no antecedent arrangement for providing it, and the loan, which, however, is regretted, did not take place till after the agreement was confirmed. On the main question, however, the articles of association expressly provide that the company may carry into effect the agreement made by the syndicate.

Bush, for Sir T. Dakin: The charges made against Sir T.

⁽¹⁾ 2 Hare, 461.

⁽²⁾ 33 Beav., 204.

⁽³⁾ 10 H. E. C., 26.

⁽⁴⁾ Law Rep., 6 H. L., 77.

Dakin are of gross personal fraud and neglect, and they are refuted by the facts proved, and especially by that of his continuing to hold a stake in the company.

Benjamin, Q.C., and *Everitt*, for Colonel Sturt and Sir James Anderson: The charge of fraud as regards these defendants ought to be withdrawn from the bill. They were not parties to the original bill, and if it was necessary to make them parties because Erlanger required it, it was not on that account necessary to charge them with fraud which it has not been attempted to prove against them. It is clear that mismanagement, and not an excessive price, was the real cause of the failure of the company. That the intention of the syndicate was *bona fide*, is shown by the fact that the members have retained a large number of the shares.

Whitehorne, for the trustee in bankruptcy of Alexander McEwen, and *Macnaghten* and *F. A. Lewin*, for a sub-partner of McEwen, contended that they were not necessary parties.

Glasse, Q.C., and *Wintle*, for Evans: This is a bill containing allegations of fraud of the basest description, of which there is not the smallest trace of positive evidence.

Ford North, for Mrs. Westall.

Higgins, in reply.

**MALINS, V.C.*, after referring to the facts of the [91 case, and reading the passages in Erlanger's answer in which he asserted that the syndicate was entirely independent of the company, continued:

I am of opinion that the claim of the company to have the purchase-money reduced to £55,000, on the ground that Baron Erlanger and those associated with him were their agents in making the purchase at that price, cannot be sustained. If they had been such agents, it would have been clear that they could not against their principals have stipulated for any advantage to themselves, and *Fawcett v. Whitehouse* (1), *Hichens v. Congreve* (2), *Tyrrell v. Bank of London* (3), and *Imperial Mercantile Credit Association v. Coleman* (4), which were so much relied on by the plaintiff's counsel, would have applied against the defendants. But that the purchase of the property, with the view to the formation of a company, does not make the purchaser a promoter of the company after it is formed, or oblige him to sell the subject of the purchase at the price he gave for

(1) 1 Russ. & My., 132.

(2) 1 Russ. & My., 150, n.

(3) 10 H. L. C., 26.

(4) Law Rep., 6 H. L., 189.

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it, or upon any other terms than such as he may think proper, has been recently decided by *Gover's Case* (¹), which was cited on both sides, and very much relied on, more particularly no doubt, as was natural, by the defendants. The case came first before Vice-Chancellor Bacon, where he puts the case with remarkable clearness, and all that was done in the Court of Appeal was to affirm what he had decided. The fact there was that Miss Gover sought to have her name taken off the list of contributories, because she stated there had been no disclosure. The point turned on whether one Mappin, who had bought a patent for £65,000, and resold it to the company partly in money and partly in shares for £120,000, was to be considered as the promoter of the company, and bound, therefore, to state in the prospectus and disclose the contract under which he had acquired the property. That was the point to be decided, and the only point to be decided. Now in that case, to show that Mappin should be regarded as a promoter of the company, he did not, as in the present case, pay £65,000 in cash for the [92] purchase of the patent. It was a small amount of cash, and the rest to be paid in shares of a company to be formed; therefore there were strong indications that he was in the beginning promoting a company, and the circumstance that he was to be paid in shares was a strong indication that such was the real motive and object. However, Vice-Chancellor Bacon did not take that view of the case, nor did the Court of Appeal differ from his decision. The Vice-Chancellor expresses himself thus (²): "He had acquired a commodity," that was the patent, "by contract between himself and Skoines," who was the patentee. "It was his to sell or deal with in any way he thought fit. He was bound, if Skoines insisted on it, to fulfil all the terms of the agreement. Whether he did or not was an affair between himself and Skoines, with which the company had nothing to do. Well, then, was it incumbent on Mappin, when he dealt with the company for the sale to them of the patent which he had contracted for with Skoines, to tell them the price at which he had agreed to buy it? I can conceive no reason why he was under such obligation. If he had advertised it in the way I have suggested as being possible—not that it has any relation in fact to the circumstances of this case—but if he had advertised that he was ready to sell a patent of which he had become the owner, the purchaser, or persons proposing to become purchasers,

(¹) Law Rep., 20 Eq., 114; 1 Ch. D., 182. (²) Law Rep., 20 Eq., 122.

would have no right to ask him what he had given for it, and he would be under no obligation to disclose what he had given for it. If the prospectus had contained a statement of the fact, it could have made no difference, because the subsequent contract of purchase by the company from Mappin could not have been influenced in any degree by the fact that he had bought at one-half the price for which they had bought it from him. It cannot in reason be suggested that, if stated, it would have made any difference in the opinions of the shareholders, or that the shareholders or intending shareholders could have been in any degree prejudiced, affected, or even influenced by the fact that he had bought at a very cheap rate at which he was selling at a comparatively dear rate. The fact that he was a promoter, which is necessary to establish this case, is not, therefore, in my opinion, established by the evidence before me, and I cannot adopt the inferences drawn from the *stipulations in the agreement as evidence of that which is unsupported by any other kind of evidence. Upon that ground, therefore, in my opinion, the applicant is not entitled to the relief which she seeks. She would be entitled under the act of 1862, if she had shown any equitable ground upon which she was entitled to be discharged from the contract. Leaving out of consideration for the moment the new law which is introduced by the act of 1867, I cannot find any equitable ground on which she would be entitled to relief. It is not inequitable that a man should buy as cheap and sell as dear as he can. The seller is under no obligation to state the price at which he purchased. The purchasers are the best judges of whether the thing offered for sale is worth the money which is demanded for it, and the shareholders know when they apply for shares, having read the prospectus, that the price which the company are to pay is that which is expressed in the agreement referred to in the prospectus. I say, therefore, laying aside the act of 1867, no equitable ground has been suggested upon which a shareholder would be entitled to retire from the contract entered into. I am unable to follow the reasoning by which it is said that there is a fiduciary relation between the parties. In the cases referred to"—they were such as *Fawcett v. Whitehouse* ('), and that class of case—in which "the fiduciary relation was clearly and plainly established, and the court proceeded upon it, but what trust or confidence exists in the case of a man who buys a patent for £60,000, and offers to sell it for

(') 1 Russ. & My., 132.

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£120,000?" I say, in the same way, what fiduciary relation is there between a man or a body of men who buy an island for £55,000, and sell it to a company for £110,000?

In the Court of Appeal, consisting of four judges, that decision was affirmed in substance by three—that is, wholly by two, partly by a third, and dissented from by the fourth, who was Mr. Justice Brett, but the law, of course, must be taken from the majority of the judges of the court, and I only refer to two passages in the judgment of Lord Justice James, in which he completely adopts the rule laid down by Vice-Chancellor Bacon. He says ('): "At the time when this agreement was made there was no company in [94] existence, and no promoter, trustee, or director; *the company had not even an inchoate existence except in the brain of Mappin; and the utmost that could be said of Mappin was that he was a projector of a company which he intended and had agreed to promote. Having acquired this equitable right in or to the patent, this dominion over it, for his own purpose and benefit, having bought what he did buy of Skoines for the lowest price he could get the latter to accept, with the view to sell it at the highest price which he could get, he did what it appears to me he lawfully and rightfully might do, he advertised his wares to the public in the following manner. In substance he says, 'I have an article to dispose of; I am willing to allow persons to become partners and shareholders with me on the following terms and conditions.' He had a right to prescribe his own terms and conditions like any other vendor with any other purchaser. The way in which he made his offer was in the usual way, viz., he entered into a provisional contract with a person on behalf of the intended company. The making of that provisional contract was, in my opinion, the first period of time at which it could be said that the company had even an inchoate existence"—here it would be the 20th of September when the contract was made with Baron Erlanger—"and it was from and after the making of that contract that any fiduciary or other relation between Mappin and the company began. In the making of that contract, in presenting his own terms and conditions, he was, according to my judgment, in the position of any ordinary vendor with any ordinary purchaser. Everything anterior to that was a matter relating to himself and to his own title as vendor." Mr. Baron Bramwell took precisely the same view; there was a little variation of opinion by Lord

(') 1 Ch. D., 186.

Justice Mellish, and that was wholly dissented from by Mr. Justice Brett.

In this case the price was paid in money, and it is therefore much stronger than *Gover's Case* (1) in favor of the vendors to the company, because there the price was to be paid, or the greater part of it, in shares of the company to be formed. I am, therefore, of opinion, as well on principle as upon the authority of that case, that Baron Erlanger and his associates were the absolute owners of the property, and were at liberty to retain it or to form *a company to [95 buy it, and had a right to demand and receive from the company, or from any other purchaser, whatever price they chose to demand for what they had to sell. In the exercise of this right they determined to form a company to work the island, and to charge the company £110,000 for that which they had, within a month, bought for just half the price.

The main and difficult question I have to decide is whether the company was formed and conducted in such a manner as to make the contract a binding one, as the defendants contend it is, or whether it ought to be rescinded, as the plaintiffs contend it ought to be. In pursuance of the plan for the formation of the company the contract for the sale of the island to a trustee for the company was entered into. The contract is set out at page 14 of the bill, and begins: "Articles of agreement made this 20th day of September, 1871, between John Marsh Evans, of Leamington, in the county of Warwick, Esquire, of the one part, and Francis Pavy, of the other part." It then recites the contract between Mr. Chatteris, the liquidator, and Mr. Evans, the present vendor, of the 30th of August. It does not recite the price that he paid, but it recites that he bought the property, and it goes on to contract that Evans would sell and Pavy would buy on behalf of the company the lease of the island and certain things specified for £110,000. The contract is very much in the same form as the contract of the 30th of August, and the 17th clause of it stated in the 20th page of the bill is in these words: "This contract is entered into subject to the above named New Sombrero Company, Limited, now in process of formation being duly formed and registered before the day fixed for completion, and to the said recited contract being duly performed." That is the 20th of September. Then there is the memorandum of association, which is dated the same day, and was probably signed and registered before the contract was signed. [His Lordship then referred to the terms of the

(1) Law Rep., 20 Eq., 114; 1 Ch. D., 182.

memorandum of association and the prospectus, and continued:] Now, considering that John Marsh Evans is one of the directors named, and is referred to in the prospectus as one of the directors, anybody reading it must have inferred that he was the vendor, and therefore at the same [96] time vendor and director, because he sells and *Francis Pavy buys. Anybody looking at the contract would have found that out, for it is as plain as possible.

This prospectus proved very attractive. No doubt it held out the greatest expectations, and was likely at that time to procure subscriptions. Applications were forthwith made by the public for many more shares than the company had to dispose of. I think the present chairman of the company states that he applied for thirty or fifty shares, but that he only got five; and, to show that he was so much satisfied with the prospect of the company, he afterwards bought more in the market, and made up the number to fifty. The whole of the shares were allotted on the 6th of October following, so that within a fortnight of the issuing of the prospectus the whole capital was actually taken up and allotted, and upon the 2d of November, £80,000, the part of the purchase-money to be paid in cash, was paid, with a check for that amount drawn by Sir Thomas Dakin, the chairman of the company, and Admiral Macdonald, countersigned by the secretary, upon the bankers of the company, which was received by Erlanger & Co., the accredited agents of the syndicate, the vendors to the company.

The company entered into possession of the property on the 21st of October, and for a time it was considered to be going on most satisfactorily. At the first meeting of the company, on the 2d of February, 1872, presided over by Sir Thomas Dakin, it was stated that the operations of the company for the first three months down to the 31st of December showed a profit of about £6,000. The proceedings at that meeting, appearing from the transcript of the shorthand writer's notes, have been referred to. [His Lordship then read the above mentioned statements as to what took place at the meeting, and continued:] Everything had then a brilliant prospect. But at the meeting held in the following August it unfortunately turned out that the accounts showed that the operations of the company up to the 30th of June, 1872, had resulted in a loss of £4,090 19s. 3d. It has been proved that it has continued to lose money ever since, and the total loss up to the 31st of December, 1874, is £7,620 15s., and it is confidently stated on the part of the

company that there is no *prospect of improvement. [97 There have, of course, been no dividends, and the shares upon which £10 have been paid are stated not to be worth £2 in the market. This is a lamentable and disastrous result for all parties concerned, and it is not surprising that it should have led to litigation. It is contended on the part of the company, which, of course, means the shareholders, that the contract to take the property at £110,000 ought to be wholly rescinded, and that the defendants, or some of them, ought to be directed to pay the whole sum and interest. It is asked on the ground of wilful misrepresentation and suppression of facts on the part of Baron Erlanger and the other persons who were engaged in the formation of the company. I do not find that they are in express terms charged with fraud, but wilful misrepresentation and suppression of known facts to induce persons to act in the belief of the facts which are misrepresented, and in ignorance of others which are suppressed, is clearly fraud, and the bill must therefore, I think, be treated as founded on fraud. I expressed an opinion at the close of the argument, to which I adhere, that it would not be justifiable on the part of the promoters to charge a company double the price which had been given for the property without clearly satisfying themselves that it was worth the increased price. Was there, then, on this subject of value, any representation made which there was not reasonable ground for believing to be true? I have read the prospectus as to the profits anticipated. [His Lordship then read paragraph 37 of Erlanger's answer, and continued:] Messrs. Pickford & Winkfield were the brokers employed by the old company, and were gentlemen who, of all others in the world, must have known what the value of the property was, for every cargo of phosphate which had come to the British dominions appears to have been sold by them. And Erlanger says: "Inquiries were also made by or on behalf of the syndicate of Messrs. Pickford & Winkfield, the brokers employed by the old company in the sale of the phosphate, and on the 6th of September, 1871," that is, a fortnight before the company was registered, "Thomas Westall received from William Pickford, a member of the firm of Messrs. Pickford & Winkfield, a letter, which he then communicated to me." [His Lordship read *the letter.] Considering the very [98 favorable opinions which were entertained in all quarters of the probable success to be derived from the working of the island, I am unable to come to the conclusion that the prospectus contains any statement as to the valuation of the

property which there was no reasonable ground for believing to be true. The statements are certainly highly colored and sanguine. But every one knows that this is the case with all prospectuses issued upon the formation of joint stock companies. That they are not fraudulent, and that they were believed to be true, is, I think, shown by the fact that the vendors took £30,000, part of the price of £110,000, in shares; and that Baron Erlanger and those associated with him still have a favorable opinion of the ultimate prospects of the company, is, I think, shown by the fact to which my attention was drawn by Mr. Benjamin, that at the time this bill was filed they continued to hold a large number of shares.

This case is, therefore, not like the one I recently decided of the *Phosphate Sewage Company v. Hartmont*, where the shares were evidently taken merely for the purpose of traffic, and almost everybody concerned, and particularly the principal defendant, sold, I think, three times over the amount of the whole capital of the company.

The next statement in the prospectus, which was much relied upon by the defendants, is, that the directors had entered into a contract to purchase the property for £110,000. It is very short: "The directors have entered into a provisional contract to purchase the property, including the lease of the island, as from 29th September, 1871, together with all buildings, plant, fixed and rolling stock, machinery, steam engines, lighters, &c., now at the island, complete and in full working order, for the sum of £110,000." It was contended that this was a false statement or misrepresentation, that the "directors" meant all those who were named in the prospectus. The only three who acted in the transaction were Sir Thomas Dakin, Mr. Evans, and Admiral Macdonald. M. Drouyn de Lhuys did not act, and Mr. Eastwick was then in Canada or on his way there, and it was contended that in consequence this was an untrue statement. I think that this statement cannot be read in the 99] strict sense which is contended *for by the plaintiffs, but that the true meaning is that the company was formed on the basis of paying £110,000 for the property.

This point has given me much anxious consideration, and I cannot say that I am perfectly satisfied that the construction I have put upon the statement does not admit of doubt. There is much force in the contention of the plaintiffs that, when the prospectus gives the names of five directors, and says that "the directors" have entered into a contract, the fair meaning is that the five have done so; and if that be a

proper view of the statement, it is clearly untrue, inasmuch as two of the five had nothing whatever to do with the contract, and with regard to the three who did sanction it at the first meeting of the directors of the 29th of September, it is plain that Sir Thomas Dakin was the only one of them who was in a situation to exercise an impartial judgment, having taken his seat upon the basis of taking fifty shares in the company, for which he afterwards paid in cash. Mr. Evans was at once the vendor and purchaser, and was the agent of Erlanger, and interested on his behalf in obtaining the £110,000, which he fixed as the price to be paid for the property. Admiral Macdonald was also disqualified, as the shares he held were the property of Erlanger, and he was, under the circumstances, necessarily bound to act in his interest, and was not in a situation to act impartially for the protection of those who might take shares in the company. I find nothing to blame in the conduct of Sir Thomas Dakin, except a singular want of caution in not inquiring into the price at which the property had been acquired by the promoters of the company, and also in signing the minutes in which it is stated that the contract of the 30th of August was produced. It appears that he did that. [His Lordship then referred to the parts of the answer of Dakin explaining his position in reference to the adoption of the contract by the company, and the meeting of the 2d of February, 1872, and continued:]

Having read those passages in the answer of Sir Thomas Dakin, I am perfectly satisfied that in the whole transaction he acted with perfect good faith, but I have stated that it is possible that greater vigilance on his part, as the only independent director, might have prevented the formation of this unfortunate company, or led to its being formed on a more satisfactory basis as to price and otherwise.

*It was contended on the part of the plaintiffs that [100 although three directors were by the articles of association to be a quorum, that must mean three of the full number of the directors required, which were at least five, and as the three who attended the meeting were the only directors, they were not capable of binding the company, and that their contract could not therefore be enforced. For this contention, *Kirk v. Bell* (1) and *Howard's Case* (2) were relied upon. If I had a case before me in which the contract of the three directors was attempted to be enforced, I should probably be bound by those cases to say that it could not be enforced. But this is a bill to rescind a contract which

(1) 16 Q. B., 290.

(2) Law Rep., 1 Ch., 561.

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has been performed, and where the parties who performed it, by entering into possession of the purchased property, had ample means of ascertaining the facts before they performed it. I cannot, therefore, apply those cases to the present, and therefore it is not necessary to consider whether the *Thames Haven Dock Company v. Rose* (¹), cited by Mr. Fry, is still law, where it was decided that a clause in an act of Parliament that there should be twelve directors, and that five should be a quorum, was directory only, and that a call made when there were seven directors only could be enforced.

It was also contended that the prospectus is defective, because it omits any reference to the contract of the 30th of August, by which Evans, on behalf of Erlanger, purchased the property. I have already stated that in my opinion the company had nothing to do with the acquisition of the property by Erlanger and the syndicate. The shareholders were invited to inspect the contract of the 20th of September, which recites that of the 30th of August, and although it does not state the price to be paid for the property, that could have been readily ascertained by inquiry on asking for an inspection of the contract; and I cannot think that persons who join joint stock companies are justified in forbearing all inquiry and investigation as to documents which they are told may be seen. Upon this point the judgments in the case of *Oberend, Gurney & Co. v. Gibb* (²) are strongly against the plaintiffs.

The least misrepresentation relied upon by the plaintiffs 101] is, that *in the prospectus it is said that a report made after a careful survey estimates the deposit at 700,000 tons at the least, and that for ten years there has been a steady and continuous supply in proportion to the labor and capital employed, the fact being that the report referred to was made in 1865. But it appears there was still more than the quantity stated to be upon the island, and certainly more than could be worked during the continuance of the lease. [His Lordship then referred to the evidence in support of that conclusion, and continued:]

Upon the whole case, it cannot be denied that the result has been disastrous to the shareholders, and I am glad to find that Baron Erlanger appears to have felt that they had a strong claim upon him, in consequence of the way in which they have been misled, and that he offered a considerable concession to them before the institution of this suit. [His Lordship then referred to the letters proposing a settlement,

(¹) 4 Man. & G., 552.

(²) Law Rep., 5 H. L., 480.

and continued:] I am bound to say I think the whole body of the syndicate would have acted very wisely, and only fairly, on that occasion, if they, like Baron Erlanger, had offered to give up all the profit they had made. I believe that was an offer which involved, on the part of Baron Erlanger, not less than £16,000, which was his share of the profit made by the resale of the property to the company. If the other members of the syndicate had concurred in that view, it is plain that the company would have been satisfied, and this litigation would have been saved. That was not accepted, and the operations of the company have been continued.

Then comes a very material circumstance, which the learned counsel for the defendants, and particularly Mr. Benjamin, pressed upon me—that the losses and the disastrous condition of the company are to be attributed to a great fall in the price of the phosphate. It seems that the price rapidly went down; that it fell from £5—which the evidence shows that they received, and might reasonably expect to be the price at the time—to £4, and even less; and now, according to the evidence of Mr. Mackay in cross-examination, the price is improving, and the prospects are somewhat improving also.

There is one thing which I ought not to pass over, and that is the very forcible remarks which were made with regard to Mr. *Westall. It was argued that this was [102 a case in which I ought to set aside the contract, because Westall, so far as I know, a respectable solicitor, who died in June, 1872, was to receive a sum of £500. But I do not, on the whole, see any reason to question the honesty of the transaction on the part of Mr. Westall. I think the sum of £500 was a fair remuneration which he might expect to receive for carrying the business into complete effect. I cannot consider that, therefore, as a bribe given to him for the purpose of deceiving others, nor do I find anything improper in that transaction.

Upon the whole case, I find it impossible to make a decree which would do complete justice. It would not, in my opinion, be just to make the extreme decree which is asked for by the plaintiffs, and I can find no ground for the alternative relief which is asked for in the return of the difference between what was given and received for the property.

Looking at all the circumstances of the case, the large profits made by Baron Erlanger and the members of the syndicate, the rigging of the market which took place with their sanction, and in which operation £6,000 or thereabouts

was expended, I cannot dismiss the bill with costs. Upon the whole, the nearest approach to the justice of the case I can make is to dismiss it without costs against all parties. Sir Thomas Dakin has had no connection with the transaction to which I have just referred, such as the rigging of the market, but the want of caution on his part obliges me to refuse to allow him any costs. The bill, therefore, will be wholly dismissed without costs.

The company appealed, serving their notice of appeal only on the members of the syndicate and their representatives. The appeal was heard on the 21st, 23d, 24th and 26th of February, 1877.

Higgins, Q.C., Davey, Q.C., and Alexander Young, for the appeal, argued on the same grounds as were taken below. They contended that the case was distinguishable from *Gover's Case* (*), which went on the ground that Map-103] pin was not a promoter at the time of the *transaction. That the quorum of directors was incompetent: *Kirk v. Bell* (*). They referred also to *Imperial Mercantile Credit Association v. Coleman* (*), *Aberdeen Railway Company v. Blaikie* (*), *Tyrrell v. Bank of London* (*), and *Lindsay Petroleum Company v. Hurd* (*).

Cotton, Q.C., Fry, Q.C., and Ingle Joyce, for Erlanger, took the same grounds and referred to the same authorities as in the court below.

Benjamin, Q.C., and Everitt, for Colonel Sturt and Sir James Anderson.

J. Pearson, Q.C., and Romer, for other members of the syndicate.

Bristowe, Q.C., and W. W. Karlake, for Mrs. Vilmet.

Bristowe, Q.C., and Kekewich, for Beer.

Whitehorne, for McEwen's trustee.

JESSEL, M.R.: The questions which have been very elaborately argued in this case appear to me to resolve themselves into very simple ones. The action—for although it is a suit by bill I shall use the modern name—is by a company against certain persons who were the promoters of that company, and who were the vendors to the company of a lease of the island of Sombrero, in the West Indies, containing deposits of phosphate, and also against some other defendants who were directors of the company at the time the contract was entered into. The object of the action is to set

(*) 1 Ch. D., 182.

(*) 16 Q. B., 290.

(*) Law Rep., 6 H. L., 189, 206.

(*) 1 Macq., 461.

(*) 10 H. L. C., 26.

(*) Law Rep., 5 P. C., 221.

aside the contract upon the ground that it was a contract unfairly obtained, and was not binding on the company. The defences set up are that it was fairly obtained; that whether it was fairly obtained or not, the company has by its laches or acquiescence precluded itself from suing; and, thirdly, that whether or not the *company has so [104 precluded itself, it is not a transaction which could be set aside by the company, though damages might be claimed in an action by individual shareholders against those persons who made misrepresentations to them to induce them to accept their shares.

In order to explain the views which I take of the matter, it is necessary to state shortly some of the material facts. It appears that this island of Sombrero belongs to the British government and that they had granted a lease of it, which lease became vested in a limited company, which was ordered to be wound up, and of which Mr. Chatteris had become the official liquidator. It further appears that the lease of the island is really a valuable property, and Mr. Chatteris, having it to sell, absolutely refused to sell it under £55,000. It appears that he so refused after having taken advice, and having come to the conclusion that it was really worth the money. It also appears that other persons who were acquainted with the substance which this island produces thought it a valuable concern, and applied to a foreign financier, Baron Emile Erlanger, who carries on business both in London and in Paris, and was then in London, stating that it was a good speculation to buy the lease at the price they mentioned, which was less than £55,000, and even ultimately at £55,000. The result was that Baron Emile Erlanger associated with himself various friends and acquaintances of his to take part in the enterprise, which was supposed to be a good speculation, and they formed what is called a syndicate, or joint partnership adventure, to buy the concern, and no doubt to sell it at a profit; for that, I think, is what they intended to do, though there is a suggestion that they might possibly work it themselves in the meantime. All that appears to me to be *bona fide*. There was a *bona fide* intention on their part when they gave this money for the lease of the island to realize a profit from it, and they thought it was worth at least the money which they gave for it. That being the position of matters, the members of the syndicate left the management of the purchase, the management of the resale, and the getting up of a company if it proved necessary or desirable to sell the lease to a limited liability company, entirely to Baron Emile

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Erlanger. He was, so to say, the managing partner of the [105] adventure. No doubt what he did he *did on behalf of himself and the others, he must be taken as their common agent, and I think they are legally liable for what he did. But beyond that, I think there is nothing affecting their personal position or their character in any way. I think it my duty to say that, because some misconstructions might otherwise be put upon the judgment I am about to pronounce.

That being the position of matters, we find that on the 30th of August, 1871, there is an agreement made between Chatteris and the defendant Evans to sell for £55,000. I cannot exactly find out what Mr. Evans is. He is indirectly connected with the business of Baron Emile Erlanger. What that means I do not know. The evidence before us is very meagre, but it does tell us so much as this. Baron Erlanger says: "The defendant John Marsh Evans was frequently at my office, and he had not, nor has he any direct connection with my firm or business." But he says he selected him as a proper person to take an active share in the management of the business if they should work it on their own behalf. He is described in the contract as of Leamington, in the county of Warwick. He does not appear to have ever resided at Leamington, but to have resided in Paris, and his only connection with Leamington was that he had a sister living there whom he sometimes visited. Beyond that, the exact position of Mr. Evans is not ascertainable from the evidence in this cause: but that he was the agent of Baron Emile Erlanger, and in that capacity the agent of the syndicate, is fully and frankly admitted. That he was the paid agent is admitted. He was to have some remuneration for his services. It does not appear at what time exactly the amount of that remuneration was settled, but it certainly was settled at a period long subsequent to the formation of the company, and as far as I understand, the amount then given to him was 100 shares in the company. That was an amount which in Baron Emile Erlanger's opinion exceeded his expectations. In that way it was an unexpected remuneration. But it appears to me, at all events, he was an agent, entitled to be paid, and if he had not been paid he could have brought an action against Baron Emile Erlanger for the amount to which he was fairly entitled. The next person who must be mentioned is Mr. Westall. Mr. Westall was a solicitor—he is dead now— [106] who had a share in *introducing the matter to Baron Emile Erlanger, and he seems to have made a bargain which

I hope is not very common, that he was to have £500 for his services; and that bargain seems to have been fulfilled, for he duly received the £500 from Baron Emile Erlanger. He was employed also and throughout as the solicitor of the syndicate, and so remained up to the time he was appointed solicitor to the company, which was some days after the formation of the company.

There are two other persons whose names it is necessary to mention, and I must say I mention them with anything but pleasure. The first is Sir Thomas Dakin, who is an alderman of the city of London, and at the time when these events happened was Lord Mayor. He was a director of the company. He seems to have become a director at the solicitation, or at the request or suggestion, of a Mr. Pincoffs, whose name also appears in the matter, and who was, I understand, a clerk and agent of Baron Emile Erlanger. I do not think it right that any slur should be cast on Sir Thomas Dakin's character by what has occurred in respect of his connection with this company. It appears to me that there is nothing in his conduct except an amount—I will hardly say of negligence—but want of attention to the affairs of the company, and which I am afraid was rather calculated upon by some one or other of the persons who induced him to join. Filling, as he did, the position of Lord Mayor, no doubt his name would be a great attraction in the city of London and elsewhere, and perhaps it was not expected that a gentleman in that position would pay much attention to the affairs of the company. I think the mistake he made was in accepting the office at all. A man should not accept an office voluntarily, the duties of which he cannot adequately fulfil. But beyond that, I do not think it would be fair, as far as I am concerned at all events, to censure further what he did in the matter. The next person who must be mentioned, and I mention him with still greater regret, is Admiral Ronald John Macdonald. He was a director of the company, and his position is rather a painful one to contemplate. He appears, as his title would denote, to have been an officer of high rank in the navy, and he seems to have been applied to under the circumstances to which I am going to allude. I prefer reading it from *the documents, to using my own language [107 on the subject. In the 47th paragraph of the Baron's answer he says this: "The defendant Ronald John Macdonald, Rear-Admiral in Her Majesty's navy, in the bill called Reginald John Macdonald, having asked me some time previously if ever I had the opportunity to recommend him

for some profitable occupation in the city in which his knowledge and experience might be of use, it occurred to me that he would be a very proper person in this case to be a director, particularly as I knew him to be well acquainted with the island of Sombrero." A correspondence took place between the Baron and the Admiral, which is in evidence, and which I will read: "12th September, 1871. My dear R. J. M.,—I hope to be able to make you a director of a very good thing in good company, £150 a year. When will you be back in London? I shall want you at the beginning of next week. Yours, Emile." Then on the 21st of September, 1871, which is the day either of the registration of the company or the day after, because there is a little dispute whether it was registered on the 20th or the 21st, and it is not very material,—we have this letter: "21st September, 1871. My dear R. J. M.,—You will be pleased to see your first introduction into the city of London by the inclosed prospectus" (that is, the prospectus of the company). "I shall have you sent for when wanted. Yours faithfully, Emile." Then the next letter is a letter from the Admiral, dated, apparently from the answer, on the 28th of September. I think the true date must be the 29th of September, which was the day when the meeting of the board really took place, and the letter refers to that. It is in these terms: "My dear Emile,—How odd it appears writing from your office. I have just returned from the first meeting of our board, and all seems most satisfactory. You know my unfortunate monetary position; tell me what I can or ought to do as regards shares, &c. I really have no disposable money at present, and if I had I could not afford to risk any, not that I consider there is any risk in the undertaking. For appearance' sake, would you allow some of your shares to go in my name, and I need not say it would be just the same as if you took them yourself, as all advantage should go to yourself. Please advise me through your broker, or through Mr. Evans, who has been [108] most kind and courteous to me." In answer *to this the Baron, who is then at Frankfort, writes: "1st October, 1871. My dear R. J. M.,—I am very glad you like the Sombrero, and hope it will open you a successful career in the city, and deliver you from the only trouble you seem to have, but mind you don't turn your good spirits by becoming a rich man. It is quite understood that we lend you the fifty shares necessary for your qualification. Ludwig knows about this" (that is, the Baron's brother), "and you speak to him. With kindest messages from the whole

family, yours, Emile." He says in the 55th paragraph of his answer: "I believe I wrote to my brother, Baron Ludwig, to put the defendant Ronald John Macdonald's mind at ease on the subject of his letter, but what arrangement was actually made I never knew until very recently, when I was informed that Mr. Louis Floersheim, a member of the syndicate, advanced £500 to the defendant Ronald John Macdonald, with which he paid for his shares, and that the said Louis Floersheim debited me with the amount." I must say, however unpleasant and painful it may be to me to say it, that I lament to see a British admiral in this position. I am very sorry to see that he should allow himself to be made what I cannot call otherwise than the mere tool of the financier; and I cannot consider him anything else than an agent of the Baron for all purposes, and not an independent person entitled to act as a director or to enter into contracts on the part of the company. As regards both him and Mr. Evans, I entirely concur with the remarks of the Vice-Chancellor in his judgment. Now, having got three directors, it was thought desirable to have two more. There was a prospectus of the company to be issued to the public, and of course the more good names or attractive names could be obtained, the more likely the company was to be floated. They, therefore, put two other names. When I say "they," I must throughout be understood to mean Baron Emile Erlanger and his agents, Messrs. Evans and Westall, and to some extent, perhaps, Mr. Pincoffs, who seems to have taken some, although a subordinate, part in the matter. They put in as a director a well known French statesman, M. Drouyn de Lhuys, who was at that time resident in France. His name was well known in this country from the part he had taken in French politics, and partly from the fact of his having been ambassador to this country. But he was *resident in France, and I am [109] satisfied that it was neither expected nor desired that he should take an active part in the management of this company. There is still one other name in the list of directors. That is also a well known name—the name of Mr. E. B. Eastwick, C.B. and M.P.—no doubt a name which it was supposed would commend the company to public notice. I think it was neither expected nor desired that Mr. Eastwick should take an active part in the affairs of the company. He was in Canada, and known to be in Canada, and not likely to return to this country for some time. Therefore we have a selection of five directors, two of whom are abroad, one is the actual agent of the promoter for conduct-

ing the sale, another is the mere puppet of the promoter, and the last is the Lord Mayor of London, who was not likely to take an active part in investigating the preliminary history of the contract which he is asked to confirm. That may or may not be called "craft and subtle device," that is mere matter of opinion, but I think the mode of nominating the directors was at least singularly well adapted to obtain a body which would sanction this contract.

We now come to the position of the agreement for sale to the company. The agreement, which was made on the 30th of August by Chatteris to sell for £55,000, was to be completed in November. On the 15th of September that agreement was sanctioned by the Vice-Chancellor. About that date, probably a few days before, but certainly some time before the 20th of September, it was arranged to bring out a limited company to purchase this leasehold property. The 20th of September is the date of the memorandum and articles, though it is said that the company was not really registered till the next day, because Mr. Chatteris, though his purchase-money was not payable until November, insisted that no company should be registered until the purchase-money was paid, which delayed the actual registration until the 21st. When we come to look at the memorandum and articles, which are admitted to have been the work of the promoters, we find that there are no *bona fide* shareholders in the ordinary sense. Seven gentlemen signed the memorandum. The first is John Marsh Evans for fifty shares; then Mr. Pincoffs for thirty shares; and then there are some nominal parties for five shares and ten shares each. [110] *The directors named by the articles of association were the five whom I have mentioned. Now, as I have already explained, it was impossible to get together more than three directors, because the other two were abroad; so we find that by the 77th clause, "three directors shall form a quorum for the transaction of business." So that here is an arrangement made by which any two of these three might carry any resolution they pleased. That being the position of matters, we find that Mr. Evans, whose name was inserted in the contract with Mr. Chatteris as the actual purchaser, enters on the same 20th of September into a contract with Captain Pavy, who was, of course, the mere nominee of Erlanger. By this contract Pavy, on behalf of the company, agrees to purchase of Evans for £110,000, to be paid as to £80,000 in cash, and as to £30,000 in fully paid-up shares; the contract between Chatteris and Evans being recited, but the price of £55,000 not being stated, and a state-

ment being made that it is believed the property is worth £110,000.

The next step that is taken is to prepare a prospectus. As far as I can see, that was contemporaneous. There is no doubt the prospectus was submitted in draft for the approval of Baron Emile Erlanger himself, and that it was finally drawn up and settled by his agents under his instructions. When everything was ready, the next step that is taken after the registration is to obtain a meeting of the directors, which takes place on the 29th of September, 1871. Up to this time Mr. Westall was the solicitor of the syndicate; and, as far as I can find, he was the solicitor of no one else. On this day, the 29th of September, three directors meet—Mr. Evans, Admiral Macdonald and Sir Thomas Dakin. At that meeting the contract between Evans and Pavy, which was a conditional contract, not binding unless adopted by the company, is adopted by the board of directors. Mr. Westall and his partner are named as the solicitors of the company, and the prospectus is directed to be issued to the public. This prospectus was issued, and attracted a very large number of shareholders. The shares having been subscribed for, the company directed possession of the property to be taken some time in the following month of October. They paid the £80,000 on the 2d of November to the Baron Emile Erlanger, they allotted the fully paid-up *shares to [111] Mr. Evans, and they were re-distributed by him; and at that time the contract was completed, with the exception that there seems never to have been an assignment of the legal estate, which apparently remains in Mr. Evans, the vendor.

I will make one or two observations about the prospectus. First of all the prospectus is complained of, and I think fairly complained of, upon the ground of its containing this statement: "A report made after careful survey estimates the deposit at 700,000 tons at the least, and for ten years there has been a steady and continuous supply, proportionate to the labor and capital employed." I should have thought, and I suppose any one would have thought, that that referred to a recent report and a recent survey. It turns out, however, that the report was made in 1865 and the survey in 1864. There is one other matter which is very important. As regards this contract all we have is this: "The directors have entered into a provisional contract to purchase the property, including the lease of the island, as from the 29th of September, 1871, together with all buildings," &c., "for the sum of £110,000. Copy of this con-

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tract, which is dated the 20th of September, 1871, and made between John Marsh Evans of the one part, and Francis Pavy on behalf of the company of the other part, may be seen at the office of the company's solicitors." If the shareholders had gone to see it (and I think in a court of justice they cannot complain that they did not see it, but must be treated as having notice of its contents) they would have found a recital of the contract from Chatteris to Evans, omitting the price, and they would have found a statement that it was believed the property was worth £110,000; but that whatever defects were afterwards found out, it was to be taken without compensation. It is to be observed that here some very material things are omitted. Now, this prospectus was issued, in my view of the case, by the promoters. It was actually prepared by them, and was brought ready printed to the meeting. It was nominally adopted by the directors; but, as I said before, I look upon two out of three directors as merely agents for the promoters, and their adoption would not make it more or less the act of the promoters. It was, in fact, the prospectus of the promoters. It does not state who the real vendors are, and it does not [12] state what the price they gave *for it was. Now, understanding, as I do, that the promoters of a company stand in a fiduciary relation to that company which is their creature; in this case that is emphatically so, for up to this time there was not really a single *bona fide* shareholder distinct from the promoters. Even Sir Thomas Dakin, when the prospectus was issued, had not taken any shares, although he intended to take some, and did ultimately take fifty and paid for them; acting as a director of the company, he would be liable to take them, but he had not taken them at that time. Now persons in a fiduciary position must make a full and fair disclosure when they are about to sell property to those towards whom they stand in that relation. Is it a fair thing to omit stating that they themselves are the owners of the property? That, I think, is obviously not fair. Is it a fair thing to omit to state they have just purchased the property at the valuation sanctioned by the Court of Chancery for half the amount? I do not think it is absolutely necessary that in all cases the price given should be stated; but, looking at the peculiar position of the parties, I think it was necessary here, though even if it had been stated, I do not think, looking at the other circumstances of the case, that my judgment would have been different from what it is now.

The next point is this: It is stated that the directors have

entered into a provisional contract to purchase the property from Evans. Was this true? I think it was a very material misstatement. First of all, the statement is, "the directors." Now it was quite impossible that "the directors" could mean the two or the three gentlemen who on the 29th of September approved of the contract, because the contract is dated on the 20th, and it so appears on the face of the prospectus. It is stated to have been entered into by "the directors." That must mean the five gentlemen named as directors. There is, therefore, a representation that those five people have entered into this contract. But then it was said "they tell you that John Marsh Evans is the vendor." It becomes still more important then, when you see that one director is himself the vendor, to know that you have four persons of high position who would be likely to exercise great care and caution before joining a concern of this kind, and to take the trouble themselves to investigate the matter before they entered *into the pro- [113
visional agreement. But, as I said before, the statement was not true. The directors had nothing whatever to do with the provisional contract; it was really entered into by the promoters, and it was not sanctioned by anybody on behalf of the company until the 29th of September. It is nothing more than a mere sham contract, a thing entered into by one agent of the promoter to sell, with another agent of the promoter to buy; there really was nothing more in it when it had been adopted than when it was entered into; and it was not a transaction which could in any sense bind the company.

Then how does the representation made by the prospectus to the shareholders become material? It is a question of substance. These gentlemen who were nominated as directors had a duty to perform, not to the then nominal shareholders, who were nobodies—there were really none, although there were persons who had agreed to take shares—but to the future shareholders who were to form the real company; and if it could be shown that every human being who came into the company took his shares upon a full disclosure of every material fact, it might well be that the payment by the company of the purchase-money out of funds which had been subscribed under those circumstances would be a sufficient confirmation. But it is not pretended that every one of the shareholders knew the facts. As far as I know no one appears to have known them except one single individual. That being the position of matters, can it be said that there was any binding contract at all upon the

company? I think not. I think the promoters being, as I said before, in a fiduciary position, not only having avoided making a complete disclosure, not only having concealed material facts, but having also misrepresented material facts, there was no binding contract on the company.

Then it is said, assuming that to be so, this is not a case in which the company can get rid of the contract. It was said, first of all, that it would be doing great injustice, that if we rescind the contract and order the return of this property, which appears to be, as I said before, a valuable property, though not worth so much as £110,000, we shall thereby enable the company to obtain more than the value of the property, and divide it not only amongst those share-
[14] holders who knew nothing about the matter, *but also amongst several shareholders who knew all about it. It is said that is not doing justice, and that the suit cannot be maintained in this form, because it will not do justice. But that argument goes too far, because it would apply to a case of the grossest fraud in every instance in which one or more of the actual shareholders of a company took part in that fraud. If the argument were once allowed to prevail, it would only be necessary to corrupt one single shareholder in order to prevent a company from ever setting the contract aside. It may be said you give to the shareholder, who was a party to the fraud, a profit, because he will take it in respect of his shares, and since as between co-conspirators there is no contribution, therefore his brother conspirators, who are made liable for the fraud, cannot make him repay his proportion. But the doctrine of this court has never been to hold its hand and avoid doing justice in favor of the innocent, because it cannot apportion the punishment fully amongst the guilty. A dozen parties to a fraud may be defendants, and one decree or judgment go against all, and if it is a fraud of such a character that none of them can bring an action for contribution, the plaintiff may at his will and pleasure enforce that judgment against any one of them, and perhaps pass over the most guilty of them; still there is no remedy as between those who commit the fraud. It is one of the punishments of fraud that there is no such remedy, and that a guilty party, though not the most guilty, may suffer the greatest amount of punishment. It is one of the deterrents to men to prevent their committing fraud. I do not see any ground of natural justice or any ground of policy which should prevent the court rescinding the contract in the case I have put.

Then it is said that though this may be a general rule, it

does not apply to a case where a company is formed for the sole purpose of carrying on the business which has been purchased, and that if the company rescind the contract the effect will be that the funds will be distributed in a manner different from that which is prescribed by the Companies Act, 1862. To that I think there are two answers. First of all, that is not the case with this company. When you come to examine the articles and memorandum of association you will find that it is formed for purchasing or leasing and working the mines, &c., in the island of Sombrero, and power *is given to the company by the 82d article, [115 first, to adopt and carry into effect the particular contract in question; secondly, to alter or vary at their discretion "any contracts or engagements by or on behalf of the company, or the terms and conditions thereof, or the time or manner at or in which any payment or securities, or obligations in respect of any such contract or engagement, may be payable, and make such payments, securities, or obligations payable at other times, or in another manner than may have been originally agreed upon, or grant or enter into a new or other contract or engagement in lieu thereof, or in exchange therefor;" and, thirdly, "they may apply for and accept, for and on behalf of the company, all or any concessions, grants, confirmations, powers and privileges from Her Majesty or from foreign governments." First of all, they could enter into a new contract, if they thought fit, at a different price with the defendants after the rescission of this contract. Secondly, assuming that to be improbable or out of the question, they could apply to Her Majesty for a grant in reversion after the expiration of the fourteen years of a lease of this island, and work it on the expiration of the present lease. Therefore it is not true that this company will necessarily come to an end, unless they are minded to put an end to it by the rescission of this contract. But even if it were true, it appears to me to make no difference as a question of law. If a company is formed to buy a building estate and erect houses upon it, and they are grossly defrauded both as to the title and the nature of the property bought, is it to be said that the party committing the fraud is not to be made liable to take back his worthless property because thereby the company would cease to carry on business? I cannot see the equity of alleging that by way of defence. It appears to me rather an aggravation of the offence committed by them, which has given so many worthy people so much useless trouble in forming a company which altogether fails by reason of the fraud practised

upon them. It appears to me, therefore, there is nothing in that defence.

It is only necessary to notice one more defence. It was said, at all events, the company is prevented by laches and acquiescence from now seeking to rescind the contract. They paid for the lease in November, 1871, and shortly [116] after that time they began to *work the phosphate. They have worked it, it is stated, until the time of filing the bill, or, at all events, after the meeting of June, 1872, when the inquiry took place, and they had notice, so it is said, as early as February, 1872, at the general meeting of the company, of all the material facts, and they chose, because they then had a flourishing report sent over by their manager from the island, to continue to work the business and carry on the trade of mining in the island, knowing the nature of the transaction which is now complained of. First of all, as a question of fact, I think the facts are not made out from the report of the meeting. All that took place was this: [His Lordship here stated what was said at the meeting as above.] Sir Thomas Dakin was in the chair, and what he says is this: "I read very carefully the prospectus, knowing the character of the liquidator, who vouches for the figures, I went entirely on the prospectus put before me when I was asked to take shares. Looking to the prospectus, and the names connected with it, I went by that, and joined the company, believing then, as I have since reason to believe, it is an important company," &c.; showing clearly that he had made no investigation, and nobody supposes that he did, or that any one did. As I said before, it is not very likely that the others did. "I do not know anything at all about the sale or purchase of this matter, but I have heard some rumors as the prior shareholder has. I made inquiries, and I am told Mr. Evans bought this, with other gentlemen, fully a month before the company was thought of or projected." Therefore his inquiries really come to nothing more than this—he imagined Mr. Evans was one of the real purchasers, and that he bought it with other gentlemen. Then he goes on to say: "It was looked upon that he had got a bargain, and cheap." So that he did not even then know the facts, and what he had heard was a mere rumor, not an ascertained fact at all. Then he goes on to say: "If they clearly stated what the arrangement was, I do not think we have any reason to complain. It appears to me the contracts between Mr. John Marsh Evans and Mr. Pavy on behalf of the company were stated in full in the prospectus, and all those persons who

joined the company were invited to look at them. Whether it cost £50,000 or £100,000 I do not think is material to the question." Then he goes on to say: "I did not ask any question whether the purchaser made money by a good *bargain, the question is whether the thing is fairly [117 stated in the prospectus, whether it is worth what is given for it, and whether it is likely to produce a profit to the shareholders." That is all that takes place about the matter and then it drops. The substance of the thing is this, that an outside shareholder has heard some rumors of an indistinct character, and the chairman has heard some rumors of an indistinct character too. Neither of them knows the facts, and that is gravely represented as a notice to the company—notice, that is, not merely to the men who attended the meeting, but notice to those absent from the meeting, and notice to the whole company of the true state of facts which should immediately have put them upon inquiry, under the penalty of having the transaction, which was open to rescission, confirmed, simply because they did not act immediately. I must say, anything more flimsy in the shape of information I have never seen—a shareholder getting up at a public meeting and simply saying he had heard rumors, the chairman saying he knew nothing about it, but he had heard some rumors. It appears to me that is utterly insufficient to affect the company with notice at all, and even if it had been, the company must have had time to make inquiries. They could not have appointed a special committee to make inquiries at that meeting; they do at the next meeting in June, and then a correspondence takes place. These bodies cannot move very fast, they must have fair and reasonable time, and it does not appear to me that sufficient time elapsed to preclude them from rescinding the contract if they were otherwise entitled to rescind it.

This, I think, disposes of all the defences upon the main point, and it only remains now to notice a single defence made on behalf of Vilmet, who, it was said by Mr. Bristowe, ought not to be made liable even if the other members of the syndicate were made liable. Now Vilmet was an original member of the syndicate. He died after the suit was instituted, and his executors were made parties by amendment. It was contended on their behalf that as this was in the nature of an *actio personalis*, the executors cannot be made liable after his death at all. But the answer to that is simply this, it is an action against partners. They are all jointly and severally liable for the acts of misfeasance committed by their *managing partners. It is [118

not a mere action for damages brought against the testator, but it is one to make his estate liable in common with his partners, and the action has no relation to those singular actions which have been held to die with the person, according to a doctrine which certainly should not be extended in the present day so as to do injustice as between the estate of the dead man and his living copartners. It appears to me there is no ground whatever for the suggested distinction, and that judgment should be pronounced for a rescission of the contract against all the defendants who were members or representatives of members of the syndicate. Of course there is no case as against the directors who were not members of the syndicate, and as they are not now before the court there is no occasion to say anything about them.

JAMES, L.J.: In this case the Vice-Chancellor appears to have proceeded, to a great extent, upon what was supposed to have been said in *Gover's Case* (*). Now I adhere entirely to what I said in *Gover's Case*, that is to say, it is quite open to a man to buy any property, at any price he likes, with a view or in the hope of selling that property to any company that he can get to buy it, if that is the mode in which he intends to dispose of it. A man may buy at any price, and may sell at any price that he can get fairly for it. But that has nothing whatever, as it appears to me, to do with the question in this case, which is, whether a man who has so bought at a low price has obtained a higher price fairly and properly in accordance with the view which the Court of Equity takes of such transactions. Now, in this case it appears to me that the decree follows almost necessarily from two or three propositions. A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect between a promoter and a trustee, steward or agent. *Such full and fair disclosure was not made in this case by the syndicate, which syndicate, it is admitted, were the promoters. Perhaps, as to the extent to which they and Baron Erlanger, on their behalf, were the promoters, the real founders of the company, it may not be unimportant to refer to one or two passages in Baron Erlanger's answer: "As soon as it was determined

(*) 1 Ch. D., 182.

by the syndicate to offer the property for sale to a public company, the said Thomas Westall" (who was the solicitor of the syndicate) "prepared the memorandum and articles of association of such a company, and he accordingly did so, and applied to the Registrar of Joint Stock Companies to register the same." Then a little further on he says this: "With this object I applied to M. Drouyn de Lhuys, in the bill named, who was the president of the Société des Agricultures de France, and I requested Mr. Frederick Pincoffs, to whom I had promised a small participation out of my own share, to apply to the defendant Sir Thomas Dakin, who was then Lord Mayor of London, to whom he was well known, and who was, as I was informed, intimately connected with the trade in chemical products; and the defendant Ronald John Macdonald, Rear-Admiral in Her Majesty's Navy, in the bill called Reginald John Macdonald, having asked me some time previously if ever I had the opportunity to recommend him for some profitable occupation in the city in which his knowledge and experience might be of use, it occurred to me that he would be a very proper person in this case to be a director, particularly as I knew him to be well acquainted with the island of Sombbrero, having had for some years the supreme naval command in those quarters. I accordingly applied to the defendant Ronald John Macdonald to become a director." And then further on he says: "Shortly before the registration of the plaintiff company, Edward Backhouse Eastwick, C.B., a member of Parliament, applied to me personally to be allowed to join the board of directors of the plaintiff company," showing, of course, that Baron Erlanger was the entire master of everything that was done and that has been done in the company. I think he says somewhere else that the syndicate registered the company. That was their position. Now they did not state the fact anywhere that they were the real vendors—the nominal vendor, in whose name everything appeared to be, was a *gentleman of the name of [120] Evans, to whose position in relation to Baron Erlanger the Master of the Rolls has referred. It is said, "they knew that they were going to give £110,000 for the property, and what does it signify whether they were giving £110,000 to Baron Erlanger or to Mr. Evans?" It is not for us to say what motives may influence men's minds, or how people may be influenced by not having that full disclosure which the rules of equity require persons in a fiduciary position to make, but I can for myself conceive it to make a very great difference indeed in the minds of persons minded to

speculate in such matters, whether they were buying a property which Baron Erlanger and his associates were selling, or whether they were buying a property which Baron Erlanger and his associates were buying with them. The fact that Baron Erlanger was concerned in getting up and promoting a company, must, in my judgment, have oozed out. If anybody had asked M. Drouyn de Lhuys—if anybody had asked Alderman Dakin—if anybody had asked Admiral Macdonald or Mr. Eastwick anything about this company, they would only have said, "Baron Erlanger is joining it, and therefore we can have no doubt it is a very good company;" and anybody who had heard that Erlanger was the promoter of the company, that he was the person getting it up, and the person with whom they were to be partners, would have said, "It must be a very good thing indeed." Therefore, it is not a technical rule at all which requires that a vendor who in any respect is in a fiduciary position should tell the exact truth, should say he is the vendor or state the interest that he has. Therefore, upon that broad principle, I think that this company, discovering the fact, whenever they discovered the fact, that the full disclosure which the rules of equity require had not been made, were entitled to have the contract set aside. Then it is said, and the Master of the Rolls has dealt with it, that there was knowledge, and with knowledge acquiescence or laches on the part of the company. I mentioned, in the course of the argument, that that meeting at which it was supposed this knowledge was acquired, or this knowledge was supposed to exist, so far from being, according to my view of the case, at all in favor of the defendants' contention, was very much indeed in favor of the [21] plaintiff's view, by showing that *there had been practically a successful concealment, because if all the shareholders, or if many shareholders, or any shareholder other than those who were concerned in the transaction, had known the real facts of the case—had known that Baron Erlanger had bought for £55,000 and was selling for £110,000, it could by no possibility have been mentioned in the way it was by Mr. Stephenson at that meeting, saying, "I have heard a rumor." In the cross-examination I think it came out that he had heard it in the train going to or coming from Brighton—that that which they were offering for £110,000 was bought a few days before for £55,000. Nobody said, "We all know it—it is perfectly well known." Sir Thomas Dakin, the chairman, did not say, "I know it perfectly well." He says, "I have heard a rumor of the

same kind myself, but the company is a very good one, and we had better not trouble ourselves too much about it." That does not prove any knowledge up to that time acquired, and to say that such talk among shareholders assembled at a *pro forma* meeting—the first meeting of the company—and not for that purpose, but for the ordinary business to be transacted at that meeting, is notice by which the company is to be bound, seems to me to be rather a *reductio ad absurdum*. But before the next meeting probably the rumor had become more frequent, knowledge had become more spread about it, and at the same time people had been stimulated into inquiry by finding that the property was not so good a property as they were told it was. No doubt they were stimulated by that, and at the next meeting, in the month of June, the whole capital having been paid only in the month of October before, suspicions are excited, a committee is appointed, and that committee makes its inquiries, and within a very reasonable time after that, in December, 1872, the bill is filed. There rarely has been a case with less of delay, less of acquiescence, and less of laches than this case.

Then it is said that the company is not the proper plaintiff, because the company is composed of different shareholders, having different interests, and that it is impossible to do equity between the defendants and the different shareholders, if you do not allow every shareholder to file his own bill or bring his own action against the persons who misled him. No doubt a shareholder *might have [122 an action against the individuals who wilfully deceived him—a shareholder may have that, more particularly under the new act of Parliament, the new section for concealment of material documents. But the ordinary remedy of a shareholder in a case of this kind would be to say, "You, the company, through and by your directors, led us into the thing—we want to rescind the contract by which we became shareholders." The remedy of the shareholder is to be relieved from his character of shareholder, and the company alone has a right to deal with the contract to which the company as a company is party. Supposing the contract had been a contract by which the company was bound to-day to pay £100,000, it would be impossible for the present shareholders to say, "We are not bound by that—you go and sue the shareholders who were shareholders at the time of the contract." Suppose the converse of the present case—suppose this company, by bribing Mr. Chatteris (if such a thing can be supposed possible), had bought for

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£55,000 from the old company that which they knew was really worth £110,000, against whom would a bill be filed to set aside that sale? Against the company. It would be no answer then to say, "You must go to the shareholders who did it—you cannot come upon the company—the company is now composed of different shareholders, and therefore you must go back to the persons who were then shareholders." The company represent the contracts of yesterday as of to-day, as they will the contracts of to-morrow, or the next day, or next year. They represent the contracts which were made by the company; they are liable upon the contracts, and they have every right in respect of those contracts which an individual being would have if he had the like case or was under the like liability. Therefore, I am of opinion that the company not only can sue, but that the company was the only proper plaintiff that could sue upon the case made by this bill. I am of opinion, therefore, that all the defences fail, and that the decree which the Master of the Rolls proposes to make is the right decree.

BAGGALLAY, J.A.: I am of opinion that the appellants are entitled, as against the respondents other than Mr. 123] Macnaghten's and Mr. Lewin's clients, *to a decree substantially in accordance with the relief prayed by the first two paragraphs of the prayer of the plaintiff's bill. In arriving at this conclusion, I assume that at the time of the purchase of the Sombrero Mine by the syndicate, as represented by Baron Erlanger, through the agency of Messrs. Evans and Westall, neither of these gentlemen stood in any fiduciary position to the company which was subsequently formed. I treat the transaction as an honest purchase of the property by the syndicate with the intention of realizing a profit either by reselling it or by working the mine themselves, but with no intention of forming the company they subsequently promoted. They had this mining property, and they had a perfect right not only to sell it to a company, but also, provided they did it in a proper manner, to form, or join in forming, a company for the purchase of it. Here, again, I may say, that as at present advised, not having heard any reply from the plaintiff's counsel, I see no reason for thinking that the syndicate, or the active members of it, or their agents, had any reason to think that the price they were asking was extravagant or unreasonable in amount. We come then to consider the circumstances under which the company was formed and the contract entered into and adopted. It was adopted, and the syndicate were, in sub-

stance, not only the vendors of the property, but also the promoters of the company, and in such a case the syndicate, as promoters, being in a fiduciary relation to the company, it was essential that the public, who were invited to become, and who were expected to become, the shareholders of the company, and to constitute the company, should have the fullest information as to all the surrounding circumstances. I need not refer in detail to what really took place, as the Master of the Rolls has done so in a very exhaustive manner. But I can hardly conceive anything more carefully arranged for concealing that information which it was essential should be afforded, than the course pursued by the promoters upon the occasion in question. As soon as the promoters had determined to form a company, a memorandum and articles were prepared by Mr. Westall, the solicitor of the syndicate, and naturally in a form well adapted to carry out the objects which the syndicate had in view. A contract was then entered into by Mr. Evans, the agent of the syndicate, in whose name the original *purchase had been made, with Captain Pavy, who [124 under the circumstance of there being at this time no other intended shareholders of the company than the syndicate and their friends must also be treated as the agent of the syndicate. This contract, the terms of which I need not particularly state, is then approved by a board of directors constituted in a very singular manner. The articles had named five directors, as to two of whom it was improbable, if not quite impossible, that they could act at the time the contract was adopted and confirmed. It was in fact adopted and confirmed by a board composed of three directors. One of these, Mr. Evans, was admittedly disqualified by reason of his interest in the subject-matter. It cannot, in my opinion, be doubted upon the evidence before us that one of the remaining two, Admiral Macdonald, was simply the nominee of, and intended to become a trustee for, Baron Erlanger, the active member of the syndicate. As regards the remaining director, Sir Thomas Dakin, I can see no reason to doubt his perfect *bona fides*. He had consented to become a director upon the faith of the prospectus, a draft of which appears to have been handed about amongst the syndicate and their friends. He offered to take and did take and pay for fifty shares; so that he had a considerable stake in the company. It is impossible, however, not to appreciate the influence which indirectly, if not directly, must have been exercised over both Sir Thomas Dakin and Admiral Macdonald by their previous intercourse with Messrs.

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Evans and Westall and the presence of those gentlemen at the meeting of the 29th of September, at which the contract was approved and the prospectus ordered to be issued. As regards the prospectus, I desire to make one observation. I rather gather from the judgment of the Vice-Chancellor in the court below that he was of opinion that more information was really given by that prospectus than it appears to me was actually and in substance given. It is quite true that in one passage it is stated that a "copy of this contract which is dated the 20th of September, 1871, and made between John Marsh Evans of the one part, and Francis Pavy, on behalf of the company, of the other part, may be seen at the office of the company's solicitor;" and it has been argued that the reference here to the agreement of the 20th of [25] September, 1871, taken in connection *with what appears in the earlier part of the prospectus, to the effect that Mr. Evans was one of the directors of the company, was an intimation to any person who read the prospectus that one of the directors was the vendor. It is quite true that if the prospectus were carefully spelt out, and the paragraph at the end compared with the paragraph at the beginning, some such conclusion might be arrived at. But I do not think it a necessary consequence, or that it would at once strike any person reading it, more particularly as it is quite possible that a person might think that Mr. Evans being a director, the information given was all that was essential, and that ought to be given. Then, again, I think that the attention of persons reading this prospectus would be diverted from any such consideration. They might have gone through the prospectus itself and seen by what is stated in another paragraph that the directors had entered into a provisional contract, and when they saw the names of five directors—for this would imply that all the directors named had entered into the contract—when they saw the names of the directors and the high position they occupied, they would naturally be led away from doing that which perhaps they might otherwise, as prudent men, have done, go to the office of the solicitor and ask to see the memorandum and articles, ask to see the contract, and if they had done so they would have seen a reference to another contract, but no recital as to the price given for the property. I think, therefore, that the prospectus does not give that amount of information which should have been given; and taking all these various circumstances together, it appears to me that the promoters did not fulfil their obligation to give the fullest and fairest information to the purchasers.

JESSEL, M.R.: The judgment will be to set aside the contract, to direct the repayment of the £80,000 with interest at £4 per cent., to direct the return of those shares which have not been parted with, and to take an account of those shares which have been sold or parted with and of the proceeds of such sales, with interest at the same rate from the time of the receipt of the moneys, the company accounting for the profit (if any) derived from the island. The *defen- [126
dants will be jointly and severally liable for the proceeds of the shares sold, for, the members of the syndicate being partners, no distinction can be made between them. Mrs. Vilmet, not admitting assets, will be liable in due course, in the same way as the assignee of a bankrupt. Upon payment the company must restore the island to the syndicate.

Solicitor for plaintiffs: *John Holmes*.

Solicitors for defendants: *Bischoff, Bompas & Bischoff; Carr, Bannister, Davidson & Morriss; White, Broughton & White; Roberts & Barlow; Kearsley, Son & Hawes; Freshfields & Williams; Cuntliffe & Beaumont*.

See *ante*, note to *Eaglesfield v. Marquis*, etc, p. 670.

[5 Chancery Division, 126.]

V.C.M., Dec. 21, 1876: C.A., Feb. 14, 1877.

WELLS V. LONDON, TILBURY AND SOUTHEND RAILWAY COMPANY.

[1876 W. 415.]

Railway Company—Extinguishment of Rights of Way—Private Way.

The plaintiffs had been entitled from 1855 to a carriage way to property of theirs over a railway by a level crossing. By an act of Parliament obtained by the company in 1875, reciting that it was expedient that the rights of way in respect of certain footways which crossed the railway on the level should be extinguished, it was enacted that all rights of way in, over, or affecting the footways numbered 2, 4, 5, 6 and 7, on the deposited plans, should be extinguished. No provision for compensation was made. The roadway in question was numbered 5 on the deposited plans, and was thereon marked "roadway and footway," the others being marked simply "footway":

Held (affirming the decision of Malins, V.C.), that upon the true construction of the act, it did not interfere with private rights of way, but only with public rights of footway, and that an injunction restraining the railway company from obstructing the way had been rightly granted.

THIS was an action to restrain the company from interfering with a private right of way.

The right of way in question arose under an agreement dated the 21st of March, 1854, between W. C. Wells and I. Perry, who were owners of certain lands in the parish of

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Leigh, in Essex, through which an intended railway was to [277] pass, and the Eastern *Counties Railway Company and the London and Blackwall Railway Company, who were applying for an act authorizing the making that part of the railway which passed through those lands. This agreement recited the title of Wells and Perry to certain property and to the soil of a roadway between different parts of this property, over which roadway it was stated that "the public have certain rights of way," and by it Wells and Perry agreed to sell certain land to the companies and to withdraw their opposition to the bill, and the companies agreed that they would make and forever maintain "a level crossing over the said intended line of railway where it passes through the said roadway, with proper gates and protection, over which level crossing the said W. C. Wells and I. Perry, their heirs, tenants, and assigns, shall have the free way of passage with horses, carts, wagons, and carriages."

Wells and Perry withdrew their opposition to the bill, which became an act, and in the following year they conveyed to the companies the land which they had agreed to sell to them, "except and always reserved unto the said W. C. Wells and I. Perry, their heirs, tenants, and assigns, out of the conveyance hereby made, a right of crossing on the level the line of railway of the said companies where it passes through the said roadway, over which level crossing the said W. C. Wells and I. Perry shall have a free passage with horses, carts, wagons, and carriages."

The level crossing was made, and the right of way over it to certain property retained by Wells and Perry was enjoyed by them without interruption till 1876. It was not clear that the public had any right of footway over it, and it appeared most probable that they had not, though they had to some extent used it.

The undertaking afterwards became vested in the London, Tilbury and Southend Railway Company, which succeeded to the rights and obligations of the two companies.

By the London, Tilbury and Southend Railway Act, 1875 (38 & 39 Vict. c. lvii), it was recited that it was expedient that the company should have power to acquire further lands for sidings and other purposes, "and that certain footways in the parish of Leigh, in the county of [28] Essex, which are now crossed by the *railway of the company on the level, should be dealt with as by this act provided, namely, that as regards five of such footways the rights of way in respect thereof should be extinguished, and

that the other footway should be carried by a bridge over the railway." And by sect. 6, it was enacted, "All rights of way in, over, or affecting the following footways in the parish of Leigh, viz., the footways numbered respectively 2, 4, 5, 6 and 7, upon the deposited plans, shall, so far as regards the land and railway of the company, cease and be extinguished, and when and so soon as the foot-bridge shown upon the deposited plans as a substitute for the present level crossing of the railway by the footway numbered 3 on those plans is made and open for use, all rights of way in, over, or affecting that footway so far as regards the present level crossing shall cease and be extinguished."

The act did not provide any compensation for the extinction of these rights of way.

The roadway now in question was that numbered 5, and was described on the deposited plans as "roadway and footway;" and in the book of reference the railway company, Wells and Perry, and the surveyors of highways, were entered as the reputed owners. Each of the other four ways was marked in the plans as "footway," and was indisputably a public footway.

In 1876, the company, considering that the rights of Wells and Perry over the roadway were extinguished, put a fence across it on each side of the railway. Wells and Perry thereupon commenced this action, and moved for an injunction. The motion was heard before Vice-Chancellor Malins on the 21st of December, 1876.

Glasse, Q.C., and *Nalder*, for the plaintiffs.

Higgins, Q.C., and *Ferrers*, for the company.

MALINS, V.C., thought that the Legislature could hardly have intended to stop a private road, the right of which was secured by contract, and that it was a serious question whether the act was intended to deal with anything but public footways. His Lordship accordingly held that, as the stopping the way to the plaintiffs' *premises was [129 a serious damage to them, an injunction ought to be granted to keep the way open till the hearing.

The company appealed. The appeal was heard on the 14th of February, 1877.

Higgins, Q.C., and *Ferrers*, for the appeal motion: The act does not purport to deal only with rights of footway, but it extinguishes "all rights of way in, over and affecting the following footways." The word "footway" is merely used as a way of designating the place. There is no right of public way over this spot, and if the plaintiffs' rights are not extinguished, the clause is inoperative as to it. The

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words used there are sufficient to extinguish all rights of way, private as well as public. If the Legislature meant what is contended for on the other side, why did it not say "all public rights of footway"? Suppose an act extinguishing "all rights of way over the horseway called Rotten Row," could the Duke of St. Alban's, as grand falconer, retain his right of driving over it? The company are willing to give compensation.

Glasse, Q.C., and *Nalder*, for the plaintiffs, were not called on.

JAMES, L.J.: I am of opinion that there is no foundation whatever for this appeal.

The construction of the act of Parliament seems to me clear. The Legislature was dealing with public, not with private, rights of way. The company's predecessors in title had agreed with the plaintiffs that they would "maintain a level crossing over the said intended line of railway where it passes through the said roadway with proper gates and protection, over which level crossing the said William C. Wells and I. Perry, their heirs, tenants, and assigns, shall have the free way of passage with horses, carts, wagons and carriages." That was the right which the plaintiffs had. Then an act of Parliament was passed stopping rights over footways, and making no provision for compensation, which always is done if it is intended by Parliament, at the [130] request of a company, *to take away a private right. This is a strong reason for holding that private rights were not intended to be affected, and there is nothing in the act of Parliament which compels us to suppose that the Legislature intended to commit the injustice of taking them away without compensation. Then, to show that it was intended to use the word "footway" as merely descriptive of the *locus in quo*, and not of the nature of the right, we were referred to the deposited plan; but that plan, so far from making out the defendants' contention, is very strong in favor of the plaintiffs, for this particular way is described upon it as a roadway and footway. I am of opinion that the plaintiffs' contention is right.

BRAMWELL, J.A.: I am entirely of the same opinion.

I agree that we ought to construe this act of Parliament according to the fair meaning of the words, even supposing the true construction of the act does an injustice to the parties. But we may well approach the construction of an act of Parliament of this kind in the belief that it was not intended to confiscate a private right, for this would be a simple case of confiscation, and we ought not to suppose

that this was intended by the Legislature or sought for by the railway company. The statute recites that it is "expedient" that the rights of way therein mentioned should be extinguished. But it certainly is not expedient that a private right should be taken away without making compensation. The Legislature, in an act providing for the execution of public works, never takes away the slightest private right without providing compensation for it, and the general recital that it is expedient that the works should be done is never supposed to mean that in order to carry them out a man is to be deprived of his private rights without compensation. That, on the appellants' construction of the act, would be the case here, because, although Mr. Higgins, on behalf of his clients, offers to make compensation, the act does not compel them to do so, and I do not know whether they showed any intention to do so before they got into trouble in this action. The contention of the appellants, therefore, really is, that the plaintiffs' private right is confiscated for the benefit of the company. That is what the Legislature never does. As regards *public [131] rights, inasmuch as there is no person particularly affected, and it is impossible to deal with all of the persons affected and to give them all compensation, such rights are often abolished by the Legislature without compensation, the benefit which the public gains being considered an equivalent for the right it loses; but the plans are first deposited, and any person having a title to represent the public in respect of such right, as, for instance, a church-warden or a surveyor of highways, may contest the case on the part of the public. Now let us see what this act of Parliament says. [His Lordship read the recital.] I do not hesitate to say that the true construction of that is that it refers only to public footways. You may, indeed, say that a man has a right of footway, but when a footway is spoken of generally, without any reference to any individual or any particular property, it means a public footway.

Now let us see how far that view is confirmed by the facts, because the court has a right to look at the surrounding circumstances to see what the meaning is. It is admitted beyond all doubt that the other footways are public footways, and I do not think it material whether this was a public footway or not. If there were no public rights of way over it, the only consequence of that is that the Legislature, in the description of the place, have made a mistake and have called it a footway when it is not so. But that does not alter the character of the act so as to make it deal

with private footways. The Legislature supposes that the public has or may have a right of footway over the spot, and the promoters of the bill, in order to extinguish any such way if it existed, put it into the act of Parliament and have dealt with it as a public way, but that does not take away the private right of way. Therefore I am satisfied that the plaintiffs' right of carriage and footway is wholly unaffected.

I quite agree that if it could be made out that the act referred to the private footway of the plaintiffs, there would be strong reason for contending that, under the words "all rights of way," the right of carriage way over the footway would be extinguished. But if you expound the act of Parliament as, in my opinion, it ought to be expounded, no such difficulty arises. The Legislature is dealing with public rights, and what it says is in effect, "All rights [32] *of the public over these footways are extinguished, and if there is any other public right of way over them it is gone." But the private right of footway and carriage way is, to my mind, utterly unaffected.

AMPHLETT, J.A.: I am of the same opinion, and have not been able to satisfy myself that there is any reasonable doubt upon the question. By the agreement of March, 1854, it was provided that the plaintiffs should "have the free way of passage with horses, carts, wagons, and carriages," over this roadway. I apprehend that the free right of way with horses, carts, wagons, and carriages, gives also a right of way without horses, carts, wagons, or carriages. The greater right carries with it the lesser, and I should, if it were necessary to decide the question, say that the footway, as well as the way with horses, carts, wagons, carriages, was secured by the agreement, but it is not necessary to give any positive opinion upon that subject. That being the right which the plaintiffs had enjoyed by contract for twenty years, we come to the act of Parliament, and the question is whether it is to be so interpreted as to take away that right: and I agree, if the language used in the act is clearly to that effect, although it may lead to great injustice, we must give full effect to it. Now, we must construe the act, looking at the circumstances, and looking not only at the enactment but at the recital. The recital is, that "it is expedient that" the rights of way in respect of certain footways, of which this is one, should be extinguished. That is the language which Parliament is apt to use when dealing with public rights. The railway itself being of public utility, the Legislature frequently deals with public rights in this way, and ordinarily shows what its object is by say-

ing "That it is expedient." Now, it cannot be expedient to take away a man's private property without giving him compensation; but it may well be expedient that certain public footpaths crossing the railway on a level should be stopped. Parliament, without providing compensation, might fairly say, We will prevent the public going over there, because it may be dangerous to the public; but if the company granted a private right to an individual there would be no reason at all for interfering with that. It *appears to me that Parliament has left the right of [133 way granted by the agreement entirely untouched, but has prevented the general public from having the right of using that road. Then it is said that you cannot secure to individuals a right of way without allowing the public also to use the right, and that, practically, you cannot stop one without stopping the other. That is an entire mistake. The company might put gates across and allow no one to pass but the plaintiffs and their servants, or give them a key to enable them to pass in and out whenever they wished to do so. That, however, really is a question with which we have nothing to do. It appears to me that the rights of the plaintiffs under agreement are not touched by the act of Parliament.

Solicitors: *Hollingsworth, Tyerman & Andrews; E. Woodard.*

[5 Chancery Division, 133.]

V.C.M., Dec. 21, 1876; Jan. 18, 1877: C.A., Feb. 21, 1877.

NEWCOMEN V. COULSON.

[1876 N. 97.]

Right of Way—Award under Inclosure Act—Road for Agricultural Purposes.

By an award under an Inclosure Act, it was directed that certain of the allottees and the owners for the time being of their allotments should forever thereafter have a way-right and liberty of passage for themselves, their respective tenants and farmers, as well on foot as on horseback, and with their carts and carriages, and to lead and drive their horses, oxen, and other cattle from the common highway over the east end of the allotments to their respective allotments, doing as little damage to the soil or the corn, grass, or herbage, as might be, and in case the allottees should "street out" the way, that the same should always remain eleven yards wide, but the road was not to be a way of right for any other persons whomsoever than as aforesaid. The owner of one of the allotments commenced building houses upon it, and began to lay down a metalled road where there had only been an ordinary cart track over the adjoining allotments:

Held (affirming the decision of Malins, V.C.), that the allottees were not confined to the use of the road for agricultural purposes only, but were entitled to construct a substantial roadway suitable for the purposes to which the land was now in course of being applied.

IN 1760 an act was passed for inclosing common lands at East Chatham, in Yorkshire. By the award made in pursuance of this act, being in form a deed to which all the [134] allottees were parties, *the commissioners allotted to Richard Agar a portion of the common, containing 7A. 0R. 4P., and directed that he should maintain the southern and eastern fences. The award conferred upon Agar and some other allottees a right of way in the following terms:—

“The said commissioners do hereby award, direct, and appoint that the said W. Turner, R. Agar, &c., &c., and the owner and owners for the time being of the lands hereby to them respectively allotted, shall forever hereafter have and enjoy a way-right and liberty of passage for themselves and their respective tenants and farmers of the said lands and grounds, as well on foot as on horseback, and with their carts and carriages, and to lead and drive their horses, oxen, and other cattle, as often as occasion shall require, from the common highway leading from Redcar aforesaid to the northeast end of the said R. Agar’s aforesaid allotment in the said East Stoney Butts, and from thence to the said old inclosures called West Dyke Closes, in, over, and through the east end or part of their said respective allotments in the said East Stoney Butts and Upper Half Acres to and from their said respective allotments without interruption, or paying any consideration for the same, doing as little damage to the soil or the corn, grass, or herbage as may be.”

The award also directed that in case the said allottees, or any of them, or any of the owners for the time being of their respective allotments, should “street out” the same way leading through their said respective allotments, the same should be made, and should forever remain, eleven yards broad, at the least, between the quick-sets, but that such way was not, nor was intended to be, admitted to be a way of right for any other person or persons whomsoever than as aforesaid.

In pursuance of this award a road was set out with a quick-set hedge on each side of it, being of the required width of thirty-three feet.

The defendants were the owners of a portion of Agar’s allotment. The plaintiff was the lord of the manor, and also the owner of the land adjoining the highway mentioned in the award. The road set out by the award from Agar’s allotment to the above mentioned highway ran over part of the lord’s said land.

[135] *The defendants had commenced building upon their land a number of villa residences, and for more con-

venient access to them they had commenced forming a solid granite road in lieu of the common cart road which had for many years existed there; and they were also about to erect a bridge across a small stream called the Stell, which formed the boundary between the land allotted under the award and the high road.

The plaintiff thereupon commenced this action, asking for an injunction restraining the defendants from erecting a bridge across the Stell, so as to rest upon or otherwise interfere with the piece of land belonging to the plaintiff situate on the south side of the high road, and from making a road upon the eastern boundary of the plaintiff's said piece of land, and from exercising any rights of ownership thereupon, and from using the same piece of land otherwise than in accordance with their rights under the award, whereby, as the plaintiff alleged, a right of road solely for agricultural purposes over the plaintiff's said piece of land was given to the owners for the time being of the defendants' land: and for damages for wrongfully entering the plaintiff's piece of land and erecting the said bridge and making the road.

The plaintiff moved for an injunction as above. The motion was heard before Vice-Chancellor Malins on the 21st of December, 1876.

When the case was opened *Glasse*, Q.C., for the defendants, submitted, for the purpose of the present application, to an injunction as to the bridge proposed to be erected over the Stell.

Higgins, Q.C., and *Procter*, for the plaintiff: The right of way is confined to such a right of way as was reasonably necessary according to the condition of the land at the time of the award, i.e., a way for agricultural purposes: *Wood v. Saunders* (¹); *Wimbledon and Putney Commons Conservators v. Dixon* (²); *Williams v. James* (³); *Cowling v. Higginson* (⁴); *Allan v. Gomme* (⁵); *Ballard v. Dyson* (⁶); *Neath Canal Company v. *Ynisarwed Railway* [136 *Company* (⁷); *United Land Company v. Great Eastern Railway Company* (⁸).

[The VICE-CHANCELLOR referred to *Dand v. Kingscote* (⁹).]

That only decides that the grantee of a mine is entitled to a way-leave sufficient to enable him to get the coal in the most approved way.

(¹) Law Rep., 10 Ch., 582.

(²) 1 Ch. D., 362.

(³) Law Rep., 2 C. P., 577.

(⁴) 4 M. & W., 245.

(⁵) 11 A. & E., 759.

(⁶) 1 Taunt., 279.

(⁷) Law Rep., 10 Ch., 450.

(⁸) Law Rep., 17 Eq., 158; *Ibid*, 10 Ch., 586.

(⁹) 6 M. & W., 174.

Glasse, Q.C., and W. W. Karslake, for the defendants, were not called upon.

MALINS, V.C.: It appears that in pursuance of the award made under the Inclosure Act of Geo. 2 a road was set out, now more than a century ago, with a quick-set hedge on each side of it of the required width of eleven yards, and the object of the present motion is to restrain the use of that road for any other than agricultural purposes.

Now, for the purpose of a road of this kind, so great a width as eleven yards was not required. If it was merely for agricultural purposes, a much less width would have been sufficient, though if it were for public purposes generally, the whole of the width would be required; because I suppose a road of some fourteen feet would be sufficient to enable carts, carriages and wagons to pass each other. Therefore the centre of the road might be used for that purpose, and the sides might be allowed to be in grass, or they might sow corn if they liked. But, at all events, if the road in the centre is used, the lord of the manor, or the proprietor of the adjoining land—in this case he is the proprietor of the adjoining land—in one capacity or the other, is entitled to the land not used for the purpose of the road. This case has been argued as if it were a case of a right of way of one man over the land of another, or in other words, what we may call an easement. Where there is a dominant tenement, the owner of the dominant tenement is the one who has the right to use the easement, and the main subject to the easement is called the owner of the servient tenement; and if this were the case of a dominant and servient [37] tenement, possibly*and probably I should be obliged to apply to it the doctrine of the numerous cases which have been cited. *Allan v. Gomme* (1), *Cowling v. Higginson* (2), *Ballard v. Dyson* (3), and, above all, that case of the *Wimbledon and Putney Common Conservators v. Dixon*, which is the most recent decision of the Master of the Rolls, affirmed by the Court of Appeal (4). All those cases were cases of easement, or of accommodation for one man or one owner over the lands of another. But this is an inclosure, and every Inclosure Act that I have ever seen or heard of, not only directs the commissioners to inclose the lands, but also to lay out the roads which are for the use of those to whom the land belongs. Accordingly this award directs that the allottees shall forever thereafter have and enjoy a right of way in manner therein prescribed. This, in my

(1) 11 A. & E., 759.

(2) 1 Taunt., 279.

(3) 4 M. & W., 245.

(4) 1 Ch. D., 362.

opinion, is a mere arrangement among the owners of the lands inclosed. It is not for one man having a mere right of way over the soil of another, but they are to have and to enjoy a way. It is said this is a way, and therefore not a road. I think it makes not the slightest difference whether it is called a road or a way. They are to have a way or a road, "and liberty of passage for themselves and their respective tenants and farmers of the place, lands, and grounds, as well on foot as on horseback, and with their carts and carriages, and to lead and drive their horses, oxen, and other cattle as often as occasion shall require."

At that time it was merely agricultural land, and, as agricultural land, as I understand, it has continued to be used until a very recent period. The defendants are owners of one of these closes adjoining this lane, or road, or way. In progress of time the defendants have found it expedient and to their interest to use this land for building purposes. Accordingly, I understand the plan is to make it available for cottage residences, and on these seven acres of land to put about twenty-six dwellings. Now, I am at a loss to see any principle on which a person who takes land under an inclosure is bound for all time to use that land for the purpose for which it was used when the inclosure was made. If that is the case here, it is the case all over the country; and I suppose hundreds of thousands, *if not mill- [138
ions, of acres of land would have this principle applied to them, that the owner of the land under the inclosure could only use the land for the purpose for which it was used when the inclosure was made, that is, for agricultural purposes; because, although they might use the land for other purposes, they could not use the roads for other purposes. The consequence would be most seriously detrimental to the interests of society in general. What is the true principle in such a case as that, where you have a right of way on a road for horses, carts and carriages of every description; for there is no limit? Mr. Higgins suggests it must mean farm carriages, because the word farmer is used here. But all the tenants would not be farmers. It does not specify that the land is to be kept as agricultural land. It is for the tenants generally; not only the farmers, but whatever tenants they have on this land, are to use the road for any purpose they require. This is a right of way not for agricultural purposes only. The award does not say that. It is to be used as a right of way generally for any purpose for which the right of way should be required.

I have no doubt whatever that the proper construction is

that it is not the case of an easement in any way, but it is the case of a grant of a road, which road is to be used for all purposes.

Then it is said, you must keep this road as it has for a long time been kept, a mere agricultural lane, that is, grass land, with a track in the centre, I suppose, on which, if you were to go with a carriage, you would find yourself much inconvenienced, and in wet weather you would probably sink in. Because it has been used in that way, you must use it for all time in that way. I read it as a grant of a road to be used for any purpose for which any road can be beneficially applied. Now, if I want to know what sort of a road it may be, I rely on two decisions on that subject, and the leading case, in my opinion, is that of *Dand v. Kingscote* ('). In that case a landowner sold an estate, reserving a right of way to and from a colliery. It was two centuries ago that the grant was made, and two centuries ago, I need not say, no one ever thought that there would be such a thing as a railway. It was then contended that, because [139] the right of way was granted in 1647, when *railways were not known, the proprietor of the colliery was not entitled to make a railway for the purpose of transmitting his coals where they were to go, but was bound to carry them in the old fashion, by a wagon or a tramroad, drawn by horses. But the decision was that he was entitled to construct a railway for the purpose, because by no other mode was it possible he could carry on a colliery in the existing state of things, at a profit. Therefore the decision in *Dand v. Kingscote* (') was, that a reservation of a right of way from and to the colliery entitled the man who had the right to adapt it to the improvements of the age, and the improvements of the age required he should have a right to use a locomotive over the land. If there is any other case to refer to, I think it is the case of the *United Land Company v. Great Eastern Railway Company* ('), which I decided originally, and which was affirmed on appeal. What was the case there? There was a piece of land which, at the time of the grant of right of way, was used for agricultural purposes, and which it was in the last degree improbable would ever be used for any other purpose, because it did not at that time seem to be adapted for any other purpose. But in progress of time it was found expedient to build on that land. There was a right of way over a railway, and this argument was again used, that the right of way was only a right of way for the purpose for which the land was used at

(') 6 M. & W., 174.

(2) Law Rep., 17 Eq., 158; Law Rep., 10 Ch., 586.

the time the right of way was granted. I took a wider view of the case. I decided it meant a right of way for all purposes for which the land could be lawfully used in all time, and my decision on that subject was affirmed on appeal. Now, here is a right of way which, in my opinion, means a right of way over these lands for all purposes to which it can be applied. Then if it is a right of way, it follows from *Dand v. Kingscote* it is a right of way to be used in the most beneficial manner in which such right of way can be used for the time being; and turning this agricultural land into building land and erecting human dwellings on it, necessarily requires, in my opinion, that the right of way to it should be such as would be available to the person who uses it, and enable him with ordinary facility to get to his dwelling houses instead of having to go dragging through an agricultural lane with his carriages perhaps let in up to the axle *of the wheels, or destroyed altogether. [140] Therefore I am of opinion, on the principle of *Dand v. Kingscote* (1), that the right of way is one including the right of improving from time to time according to the improvements of the age, and as this right of way can only be used by metalling or laying down some hard material which shall enable the parties to pass over the land with facility, I think the motion should be refused. I am of opinion that this is a right of way in the most extensive terms that can be used, and that the defendants are entitled to do all they have attempted to do, except to build the bridge, about which I give no opinion. My decision is, therefore, that the motion as to the right of way must be refused. But the interim order must be continued as to the bridge.

The defendants will have the right to proceed with the construction of their road, including the right to deposit slag on the land and to repair it. I mean them to have the fullest right of metalling the road and making it the best road they can to meet the circumstances.

The plaintiff appealed. The appeal was heard on the 21st of February, 1877.

Higgins, Q.C., and *Proctor*, for the appellant: This was a right of way to the whole allotment, and even if the defendants, as owners of part of it, have any right of way, they cannot split up the field into a number of small lots with houses on them, and use the way for each. It has never been decided that a right of way continues after partition of the dominant tenement: *Gale on Easements* (2);

(1) 6 M. & W., 174.

(2) 5th ed., p. 569.

Bower v. Hill (*). Then we say that the way is a way only for agricultural purposes: *Wimbledon and Putney Commons Conservators v. Dixon* (*); *Wood v. Saunders* (*). The reservation of the way to "farmers" indicates agricultural use only. By the Roman law, the owner of a right of way was not entitled to lay it down with stones: Gale on Easements (*). There is a provision in the award that the grantees are to do as little damage as may be to the grass [41] and soil; *the laying down a metalled way is in violation of this. Assuming even that when the houses are built the defendants will have a right to make such a road as is necessary for convenient approach to them, they are premature in making such a road now.

[They also referred to *Pomfret v. Ricroft* (*), *Rowbotham v. Wilson* (*), *Allan v. Gomme* (*), and the cases mentioned in the judgment of the Vice-Chancellor.]

Glasse, Q.C., and *W. W. Karslake*, for the defendants, were not called upon.

JESSEL, M.R.: I think that this appeal cannot be maintained. The first question to be considered is, what is the effect of the grant? It is not very artificially worded, but we must look at it with regard to the nature of the case. The inclosure was carried out in a way that was common in former times, by a deed to which all the allottees are parties. [His Lordship read the clauses, which are set out above.]

The first point made was this: It was said that as this was a grant to the owner and owners for the time being of the lands, if the lands became severed the owners of the severed portions could not exercise the right of way. I am of opinion that the law is quite clear the other way. Where the grant is in respect of the lands and not in respect of the person, it is severed when the lands are severed, that is, it goes with every part of the severed lands. On principle, this is clear. It never could have been contemplated in the case of an award like this that the property was never to be divided, nor is it to be contended that if a man died and left two or three daughters co-heiresses, and they partitioned the estate, the right of way was lost, and their allotments forever deprived of access to the highway. But, in addition to that, I think that the case is fairly covered by authority. In *Harris v. Drewe* (*) a pew was granted by a faculty to John Emery and his family forever, and the

(*) 1 Bing. N. C., 549.

(*) 1 Ch. D., 362.

(*) Law Rep., 10 Ch., 582.

(*) Page 554.

(*) 1 Wms. Saund., 321.

(*) 8 H. L. C., 348.

(*) 11 A. & E., 759.

(*) 2 B. & Ad., 164.

owners and occupiers of the said messuage, exclusively of all other persons. The plaintiff Harris *occupied a [142 summer-house which he had converted into a house, and into which he had thrown one room of the old house. It was held that he had a right in the pew in respect of his occupation of that one room. Lord Tenterden says⁽¹⁾: "The plaintiff was the occupier of the summer-house and of one room which was part of the old dwelling house. The faculty gave a right to the several persons who should be occupiers of the messuage to use the pew." And then Justice Littledale says: "I am of the same opinion. The plaintiff having a right by the faculty to use the pew, the churchwardens had no right to interfere as they did, and were wrongdoers. It may certainly happen, in consequence of a house being subdivided, that three or four families may become entitled to use a pew belonging to the original messuage." There are the very words, "owners and occupiers." The same point in another shape came before the Court of Queen's Bench in *Codling v. Johnson*⁽²⁾, where in trespass *quare clausum fregit* the defendant prescribed in a *quest* estate for a right of way over the *locus in quo*. It appeared that the defendant's land had within fifty years been part of a large common, and afterwards inclosed under the provisions of an act of Parliament, and allotted to the defendant's ancestor, and it was held that notwithstanding this evidence the right claimed by the defendant's plea might in law exist, and the jury having found that in fact it did exist, the court refused to disturb the verdict. Justice Bayley there says: "It appears by the report that the jury were satisfied of the existence of this immemorial right of way. Suppose this land to have been part of the waste before the inclosure, then the lord might have the right for himself and his tenants to use the way, and then each person having an allotment under the inclosure would have the right of way." It seems to me, therefore, both on principle and authority, we must decide against the appellant.

The next point made was this: It was said that the grant conferred a right to use the way only so long as the allotment was used for agricultural purposes. I cannot find any such restriction. The right is to the owners or owner for the time being of the lands. Now land, according to English law, includes everything on or under the soil; all buildings that you may erect on it; all *mines that [143 you may sink under it. If an allottee builds a house, or, as it is said here, twenty-six houses on the land, the owner

(1) 2 B. & Ad., 166.

(2) 9 B. & C., 933, 934.

of each house, with the soil on which it stands, is an owner of part of the lands, and entitled to the benefit of the grant. Irrespectively of the technical meaning of the word "land," it could hardly be contended that on the occasion of an inclosure it was contemplated that at no time thereafter would any allottee erect on any part of these large allotments, which I see include old inclosures, any laborers' cottages, or any house or dwelling of any kind, or even a stable for his horses. I have no doubt, therefore, that the word "land" is used advisedly. This being so, it appears to me the right is a general right of way, a right of way to all the houses which may be built on the land in question.

Then it is said the provision that the allottees shall do as little damage as may be to the soil or the corn, grass, or herbage, prohibits what is now being done. That provision obviously is put in to show that if the way was not fenced off the persons using it must only go from point to point in the shortest way, and not deviate over the field so as to damage the corn and grass more than necessary. It appears to me that these words by no means limit the right of the grantee to use the way for all reasonable purposes.

Then it was said, admitting the owner of each house to have a right of way, still the grantees have no right to enter upon the allotments over which the right of way is granted for the purpose of laying down a metalled road. Now it was conceded to be the principle of law that the grantee of a right of way has a right to enter upon the land of the grantor over which the way extends for the purpose of making the grant effective, that is, to enable him to exercise the right granted to him. That includes not only keeping the road in repair but the right of making a road. If you grant to me over a field a right of carriage way to my house, I may enter upon your field and make over it a carriage way sufficient to support the ordinary traffic of a carriage way, otherwise the grant is of no use to me, because my carriage would sink up to the naves of the wheels in a week or two of wet weather. It cannot be contended that the word "repair" in such a case is limited to making good the [144] defects in the original soil by subsidence *or washing away, it must include the right of making the road such that it can be used for the purpose for which it is granted. Therefore I think the defendants have a right to make an effective carriage way going, as they are going, by the shortest route, and not interfering with the land to a greater

extent in width than the width of the street pointed out by the deed itself.

The last point was this: It was said, "Assuming the defendant has such a right, at all events he has not that right now, he has not yet completely built his house or houses; they are only in process of building, and he is preparing to make his road before it is wanted." As to that, it appears to me that we must look at the case in a reasonable way. If a man is building a house or houses, and he wants carts or carriages to go along the road, either to carry materials for the building, or with a view to the use of the inhabitants of the houses when built, it is not reasonable to say that he may not make his road till the house is completed and somebody is going to inhabit it. The reasonable thing is, that he may during the building do, by way of anticipation, that which he would, according to this argument, have the right to do the moment the house was completed. But there is an additional answer to that argument, that, assuming it to be sound, it would not justify an injunction. If a man is about completing a house, and would have the right to make a road to it as soon as it was completed, the intermediate damage occasioned by his making the road while the house is building must be of the most trifling description. It must be the loss for that short time of the grass which would grow over the road which was continually traversed by men, horses, and carriages. Such a case is certainly not one in which the court will interfere by injunction. Nor was the case really put on that ground. For these reasons, it appears to me that the judgment of the Vice-Chancellor ought to be upheld.

JAMES, L.J.: I am of the same opinion. As to what was read from the Vice-Chancellor's judgment about this not being an easement, I think there must be some mistake. It is an easement, and our judgment is based upon its being such. Those rights which the *Master of the Rolls [145] has held to belong to the defendants, in which I fully concur, belong to them as the owners of an easement in respect of the dominant tenement as against the owner of the servient tenement. As to forming a substantial carriage road, I agree with the Master of the Rolls. The case is not, in my opinion, one-tenth part as strong or as difficult as *Dand v. Kingscote* ('), on which we are told the Vice-Chancellor proceeded.

BAGGALLAY, J.A.: I agree.

Solicitors: *T. Crowdy & Son; J. Trotter.*

See 8 Eng. Rep., 774 note; 18 Eng. Rep., 858 note.

As to when the owner of the soil may maintain gates across a way, see Washb. Eas. (3d ed.), 216, 264-5, 261.

As to building over it: Washb. Eas. (3d ed.), 262; Leland v. Hathorn, 42 N. Y., 547; Pinchin v. London, etc., 1 Kay & Johns., 34; Smith v. Smith, 110 Mass., 302; Pickering v. Rudd, 4 Camp., 219; 3 Camp. Lives Chief Justices, 169; Moak's Van Sant. Pl., 452.

A testator devised part of lot 17 to his son Charles, and part of lot 18, adjoining it to the east, to his son William, adding that, in order to give Charles free access to and from the side road on the east side of lot 18, the lane or road "now running across" the land devised to William, "commencing at my gate on said road," and in width half a chain, to the west limit of 18, should be kept open for the free use of his said sons, with a proviso that should the whole estate bequeathed to them come into the possession of any one person, this provision, "in reference to the continuance of said lane or road," should become void.

Held, that the testator evidently intended that the lane should be continued as then existing and used; and that the defendant, claiming under Charles, had no right to remove the gate on the side road: Van Sickle v. Kelly, 42 U. C. Q. B., 274.

To same effect, O'Brien v. Schayer, 124 Mass., 211.

Nothing passes as incident to the grant of a private way over one's land, but that which is necessary for its reasonable and proper enjoyment.

What is necessary for such reasonable and proper enjoyment of the way granted, and the limitations thereby imposed on the use of the land by the proprietor, depends upon the terms of the grant, the purposes for which it was made, the nature and situation of the property subject to the easement, and the manner in which it has been used and occupied.

In an action by the grantee of a private right of way against the grantor, for the obstruction of the way by the erection of gates, it was held:

That the questions whether, under all the circumstances of the case as

disclosed by the testimony, the gates were necessary to the defendant for the useful and beneficial occupation of his land, looking to the situation of his property; and whether the particular gates complained of were usual and proper under the circumstances; and the further question whether their existence upon the road interfered with the reasonable use of the right of way by the plaintiff, considering the situation of his property, and the manner in which it was occupied, and the intent of the parties as to the mode in which the right of way was to be used, were all questions proper to be decided by the jury upon the evidence in the case: Baker v. Frick, 45 Md., 837.

If one who has a right, by license, to enter upon the land of another, for a lawful purpose, exceed his license or abuse his authority, he is liable for the consequential damages arising therefrom in an action of trespass *quare clausum fregit*.

If a party who possesses a license to enter on the land of another, take down a gate erected thereon, to enable him to enter, and neglect to restore it to its place, whereby his swine are enabled to trespass upon the plaintiff's land, he is liable in trespass for the damages thereby occasioned: Kissecker v. Morin, 36 Penn. St. Rep., 813.

The plaintiff granted to the defendants a right of way over his land, and covenanted to erect a gate at the terminus. The defendants covenanted in the same instrument to make all the necessary repairs to the said gate. The plaintiff erected the gate, and the same was removed by some person unknown. Held that the defendant's covenant bound them to replace the gate.

Held, also, that the covenant was continuing, and therefore that an action brought thereon by the plaintiff after the gate had been removed, to recover for damages occasioned by cattle coming on to his land in consequence of such removal, and judgment in such action in favor of the plaintiff, was not a bar to another action on the same covenant to recover for damages accruing after the commencement of the first suit.

The proper measure of damages in an action upon such a covenant, after the removal or destruction of the gate,

is not the cost of rebuilding such gate, but the actual injury sustained by the covenantee upon his land: *Beach v. Crain*, 2 N. Y. Rep., 86.

When a right of way is proved to exist by adverse use and enjoyment only, the ordinary use which establishes the right limits and qualifies it.

An action lies against the owner of land for erecting a building over a passage way in such a manner as to obstruct the plaintiff's right of depositing merchandise thereon, or hoisting merchandise into the windows of his adjoining building, and the incidental right of swinging his shutters over the passage way: *Richardson v. Pond*, 15 Gray, 387.

A., the owner of a large town lot, sold and conveyed a part thereof to B., and covenanted that he would leave an adjoining strip, ten feet in width, open forever for the public convenience and the use of the adjoining lots.

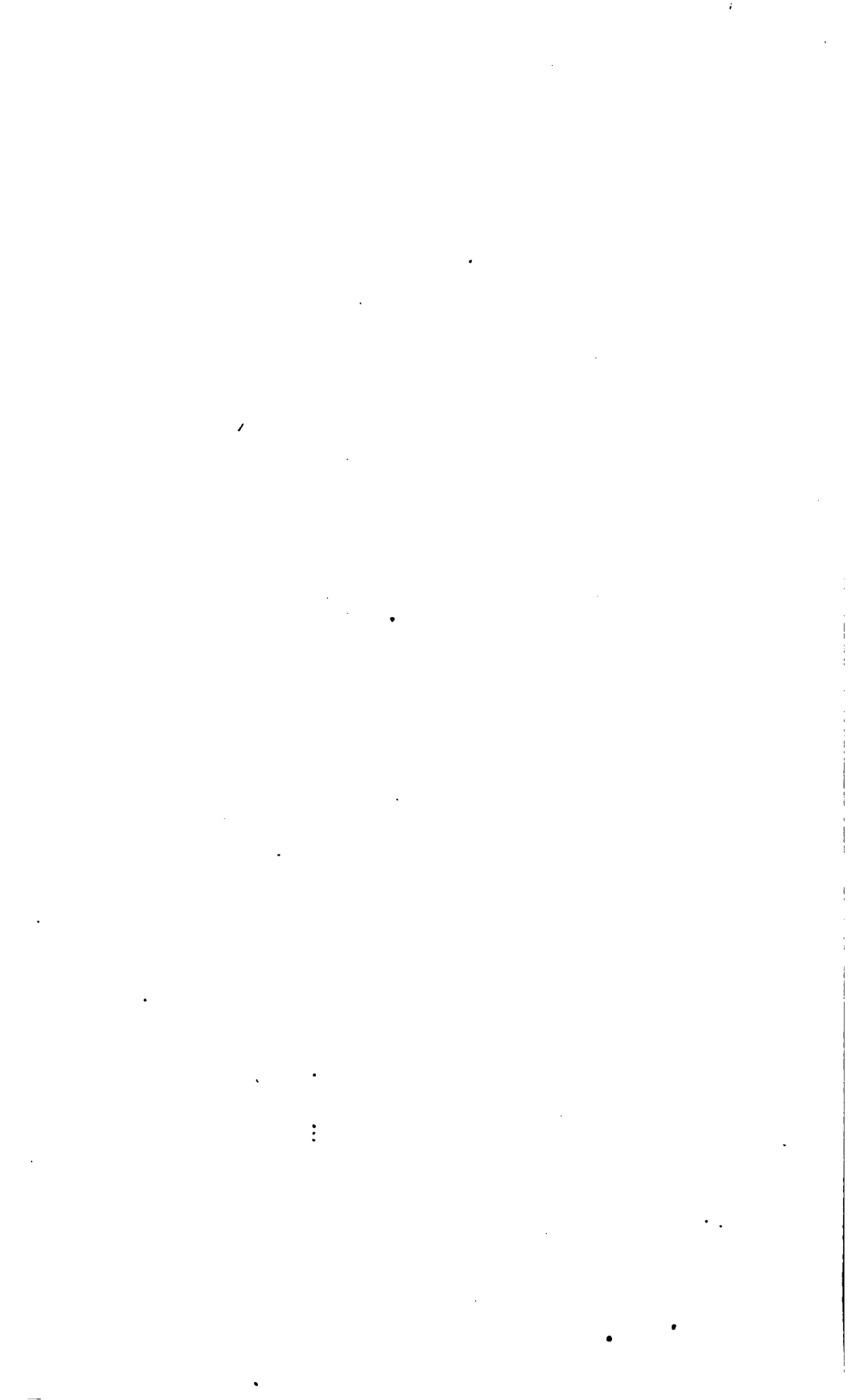
The covenant is a covenant real, running with the land, and is equivalent to a direct grant of an easement.

B. is entitled to the unobstructed use of the *entire* passway, and may properly invoke the aid of a court of equity to restrain by injunction an adjoining owner from erecting a balcony over said passway, and a stairway to connect with the balcony, whereby said passway would be obstructed. The court would exercise the jurisdiction regardless of the question whether such obstruction would be a public or a private nuisance: *Brew v. Van Deman*, 6 Heisk. (Tenn.), 438.

The owner of two adjoining messuages, fronting on a street, conveyed

one of them by a deed, in which, after stating that there was, on the south side of the messuage conveyed, a gate or passage way of about five feet wide, leading from the street into the yard thereof, reserved to himself, his heirs and assigns, free liberty of ingress and egress, etc., through and upon said gate or passage way, for carrying and recarrying wood, etc., through the same, and over the yard of the granted messuage into and from his own adjoining house and land. Held, that the width of the passage way was not definitely fixed by the deed, and that the reservation was of a right of a suitable and convenient passage for the purposes indicated. Held, also, that although the grantor, and those claiming under him, had used the passage way long enough to gain a prescriptive title thereto, yet as it had been used in near conformity to the terms of the reservation, it must be deemed to have been enjoyed under the reservation, and not adversely thereto, and must be limited by the terms thereof.

The owner of land, over which his grantor has reserved a passage way, may lawfully cover such passage way with a building, if he leave a space so wide, high and light, that the way is substantially as convenient as before for the purposes for which it was reserved; and he is not liable for damages, although the passage way, by reason of its being so covered, becomes to a greater extent the resort of strangers, to the annoyance of the grantor: *Atkins v. Boardman*, 2 Metc., 457, 467-9.



INDEX.

A.

ACCEPTANCE.

See ASSIGNMENT, 792, 795 note.

ACCIDENT.

1. The 10 Vict. c. 27 (The Harbors, Docks and Piers Act, 1847) enacted that "The owner of every vessel, or float of timber, shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbor, dock, or pier, or the quays or works connected therewith; and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same; and the undertakers may detain any such vessel, or float of timber, until sufficient security has been given for the amount of damage done by the same." There was a proviso exempting the owner from liability in cases where the vessel was in charge of a licensed pilot whom the owner was "bound by law to employ and put his vessel in charge of":

Held (affirming the judgment of the Court of Appeal), that, in a case where the damage to the pier had been occasioned by a vessel, through the violence of the winds and waves, at a time when the master and crew had been compelled to escape from the vessel,

and had, consequently, no control whatever over it, the owners were not liable. *River Wear Comrs v. Adamson*, 1, 35 note.

ACT OF GOD.

See ACCIDENT, 1, 35 note.

ACTION.

See STATUTORY DUTY, 541, 549 note.

ADMIRALTY.

1. *Charterparty.* A cargo of railway bars was shipped under a charterparty to be carried from a port in England to Taganrog, in the Sea of Azof, or so near thereto as the ship could safely get, freight to be paid in London against certificate of right delivery of cargo. On the arrival of the ship, on the 17th of December, at Kertch, which was as near as he could then get to Taganrog, the captain found the sea blocked with ice till the ensuing spring; and he proceeded to discharge the cargo, notwithstanding the opposition of the charterer's agent. By the bill of lading the cargo was deliverable at Taganrog to a Russian railway company, "freight and other conditions as per charterparty." As no bill of lading was produced at Kertch, the captain

- placed the cargo in charge of the custom house authorities; and they on the 27th of December delivered it to the agent of the railway company on his producing written authority from the company, together with copies of the charterparty and bill of lading, notwithstanding the captain's claim to retain it until the freight was paid. The agent of the company gave a written acknowledgment that he had received the cargo on the power of the charterparty and bill of lading passed to him by the railway company. The ship then sailed from Kertch. The shipowner having sued the charterers for freight:
- Held*, affirming the judgment of the Queen's Bench Division, first, that the plaintiff was not entitled to full freight, as the delivery at Kertch was not a delivery within the charterparty; secondly, that the plaintiff was not entitled to freight *pro rata*, as no new contract for such freight had been made. *Metcalfe v. Britannia, etc.* 198
2. The plaintiffs hired from the defendant a vessel under a charterparty, by which the vessel was let to the plaintiffs for a specified time, and they were to have the whole reach of her holds except what was reserved to the owner for the crew; the crew were to assist in loading and discharging, and the captain was to sign bills of lading and to furnish to the charterers a copy of the log. The defendant engaged and paid the master and crew. Whilst the vessel was upon a voyage under the charterparty, with a cargo on board belonging to the plaintiffs, she and her cargo were lost by the negligence of the master and crew:
- Held*, that the master and crew were the servants of the defendant for the purpose of navigating the vessel, and that he was liable to compensate the plaintiffs for the loss sustained by them. *Omao, etc., v. Huntley.* 383
3. *Collision.* An action was instituted against a foreign ship to recover damages for the death of the husband of the plaintiff alleged to have been caused by a collision brought about by the improper navigation of the ship proceeded against:
- Held*, that the court had jurisdiction to entertain the action, and on appeal this decision was affirmed by James and Baggallay, L.JJ. (Bramwell and Brett, L.JJ., dissenting). *The Franco-nia.* 581
4. A ship and a bark were both on the port tack. The bark was the leading vessel, and had the wind three points free; the ship was close hauled and was overtaking the bark:
- Held*, that it was the duty of the vessel with wind free to keep out of the way of the other. *The Peckforton Castle.* 607
5. When a vessel is launched in a river, the law casts upon the persons in charge of the launch the obligation of conducting the launching operations with the utmost precautions, and of giving such notice as is reasonable and sufficient to prevent any injury to passing vessels.
6. Circumstances in which it was held that proper precautions had not been taken. *The Andalusian.* 615
The Glengarry. 619
7. *Fraud in registry.* A cause of forfeiture, under the 103d section of the Merchant Shipping Act, was instituted on behalf of a British officer of customs against a vessel seized for an alleged infringement of the provisions of that section. The plaintiff in his statement of claim in effect alleged that on the 18th of July, 1874, one of her owners, being a British subject, had falsely represented, contrary to the fact, and with intent to conceal the British character of such ship, that she had been sold to foreigners. An appearance in the action having been entered on behalf of a foreigner as defendant, a statement of defence and counter claim was delivered on his behalf, which in the 7th paragraph thereof set up the defence, that on the 6th of July, 1876, the defendant became *bona fide* purchaser of the vessel proceeded against, for valuable consideration, without knowledge of any of the matters alleged in the statement of claim. The plaintiff demurred to the 7th paragraph of the statement of defence.
- The court sustained the demurrer, and held that the property in the vessel proceeded against was divested out of its former owners, and vested in the Crown immediately on the commission of any of the offences in respect of

which, under the provisions of the section, the penalty of forfeiture was imposed. *The Annandale*. 595

8. A cause of forfeiture, under the 103d section of the Merchant Shipping Act, 1854, was instituted on behalf of a British officer of customs against a vessel seized for an alleged infringement of the provisions of that section. The plaintiff in his statement of claim alleged that on the 18th of July, 1874, one of her owners being a British subject, had falsely represented, contrary to the fact, and with intent to conceal the British character of such ship, that she had been sold to foreigners. An appearance in the action having been entered on behalf of a foreigner as defendant, a statement of defence and counter claim was delivered on his behalf, which in the 7th paragraph thereof set up the defence that on the 6th of July, 1876, the defendant became *bona fide* purchaser of the vessel proceeded against, for valuable consideration, without knowledge of any of the matters alleged in the statement of claim. The plaintiff demurred to the 7th paragraph of the statement of defence:

Held, affirming the decision of the judge of the Court of Admiralty, that the demurrer must be allowed; for that the property in the vessel was divested out of its former owners, and vested in the Crown immediately on the commission of any of the offences in respect of which, under the provisions of the section, the penalty of forfeiture was imposed. *The Annandale*. 604

9. *General average*. A claim for a general average contribution must receive a liberal construction; and therefore where a part of a vessel has been injured by the perils of the seas, and has thereby become dangerous to her and her cargo, the mere possibility of saving the injured part will be sufficient to render its sacrifice, for the purpose of saving the whole adventure, a general average loss; and, provided the injured part at the moment of sacrifice is of some value, the right to contribution arises, although it would probably have become at a subsequent time useless and of no value if it had been allowed to remain affixed to the vessel.

10. For the purposes of general average contingent wreck is not to be treated as actual wreck.

11. Whilst on a voyage to H. a vessel met with a storm, which caused parts of the rigging to give way; the main-mast in consequence began to lurch violently, and was cut away by the captain's orders for the purpose of preventing it from tearing up the vessel and sacrificing the whole adventure; the mast might possibly have been saved if the weather had moderated quickly; the vessel, having outlived the storm, was repaired at a port of refuge, and proceeded on her voyage to H., where she delivered her cargo. An action having been brought by the owners of the vessel against the owners of the cargo for a general average contribution for the loss of the mast, at the trial the judge asked the jury whether at the time of sacrifice the mast was virtually a wreck and valueless; but he did not ask them to find whether, if the weather had moderated, the mast could possibly have been saved, nor did he ask them to find whether the mast was cut away to save the adventure, or as a mere incumbance:

Held, a misdirection. *Shepherd v. Kottgen*. 474

12. *Jurisdiction*. An action of co-ownership was instituted on behalf of a foreigner against a foreign vessel. On the vessel being arrested an appearance under protest was entered for another foreigner, who applied that the action should be dismissed.

It appeared that the representative of the state to which the ship belonged declined to interfere, and the court dismissed the action with costs. *The Agincourt*. 622
The Evangelistria. 624

13. *Necessaries—Lien*. The statement of claim in an action of necessities *in rem* alleged that in November, 1874, the plaintiff had supplied to the owners of the vessel proceeded against certain stores necessary for her equipment; that in September, 1876, whilst the amount due in respect of the said stores was still unpaid, forty-three sixty-fourth shares in the vessel had been transferred to the defendant in the action with knowledge and notice of the plaintiff's claim; that the plain-

tiff became owner of the shares subject to such claim; and that the value of the shares was increased by reason of the said equipment, and the owners of the vessel had derived benefit therefrom:

Held, on demurrer, that the statement of claim showed no right of action in respect of the vessel as against the defendant. *The Aneroid*. 601, 604 *note*.

14. *Salvage*. A German steamship was wrecked in British waters, and the lives of ten passengers and of some of her crew were saved by certain boats. Subsequently, divers employed by the owners of the cargo in the steamship succeeded in recovering from the wreck a large amount of specie. A cause of salvage was instituted on behalf of the owners, masters and crews of the boats against the owners of the specie:

Held, by James and Baggallay, L.J.J., affirming the judgment of the judge of the Admiralty Division (Brett, L.J., dissenting), that the plaintiffs were entitled to be paid salvage remuneration out of the proceeds of the specie. *Cargo of the Schiller*. 566

15. Under the Harbors and Passing Tolls, &c., Act, 1861, part vii, the harbor of Ramsgate and the property and powers of its trustees are transferred to the Board of Trade. In a suit for salvage remuneration for services rendered by a vessel belonging to the harbor, and vested in the board, under the provisions of the act:

Held, that the vessel was not "one of Her Majesty's ships" within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, ss. 484, 485), and that the claims must be adjudicated upon without the consent of the admiralty in the section last mentioned. *The Cybele*. 609

16. *Warranty*. The implied warranty of seaworthiness into which the owner of a ship enters with the owner of her cargo, attaches at the time when the perils of the intended voyage commence, that is, when she sets sail with the cargo on board for her port of destination; and this warranty is broken if she is then unfit to encounter these perils, although she may have been seaworthy whilst lying in the port of loading, and also at the times of starting from her anchorage for and arriving at the place of loading appointed

by the charterer, and of commencing to take on board her cargo.

17. The defendants were the owners of a vessel, and chartered her for a voyage to D., from the port of S., where she was then lying in a seaworthy condition. Pursuant to the terms of the charterparty, and by the orders of the plaintiff, the vessel proceeded to a wharf situate in the port of S., and there loaded on board a cargo of cement belonging to the plaintiff. At the time when she commenced taking in the cargo she was seaworthy; but by the time of setting sail on her voyage she had from some unknown cause become unseaworthy. The defendants were not guilty of negligence in sending her to sea in the condition in which she then was. Soon after starting from S. she began to leak; but the wind being fair for the voyage to D., the master resolved to keep his course for D., and he was not guilty of any negligence in not returning to S. The vessel did not reach D., but foundered at sea, and the plaintiff's cargo of cement was totally lost:

Held, that the warranty of seaworthiness implied by law upon entering into the charterparty had been broken, and that the plaintiff was entitled to recover the value of the cargo shipped by him on board the vessel. *Coke v. Davidson*. 208

See ACCIDENT, 1, 35 *note*.

CARRIER, 362.

TITLE, 626.

ADULTERATION OF FOOD.

1. The appellant, a publican, was convicted under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, for "selling to the prejudice of the purchaser a pint of gin which was not of the nature, substance and quality of the article demanded by such purchaser." A person asked for a pint of gin at the appellant's premises. The appellant said that he had gin at 2s. and 1s. 4d. per pint. The purchaser bought a pint at the latter price. On analysis the gin was found to contain 43.15 per cent. of water, that is, it was 43.15 below proof, but the mixture was not injurious to health. The magis-

trate found that there was no recognized standard of alcoholic strength for gin, but that it varied from proof to 20 under proof:

Held, that whether the mixture in question was what a purchaser buying gin without any further description would reasonably expect to receive was a question of fact for the magistrate; and that there was sufficient evidence to justify the conviction. *Webb v. Knight*. 249

ADULTERY.

See CORROBORATION, 284, 288 *note*; 289, 296 *note*.

ADVERSE POSSESSION.

See LIMITATIONS, STATUTE OF, 216.

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See AUCTIONEER, 154.

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See ADMIRALTY, 198.
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GAMING, 524, 530 *note*.
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PERFORMANCE, 812.

ALIMONY.

1. A sum of £5,000 damages was apportioned by the court as follows: £1,500 was settled on the youngest child of the marriage, aged five years, the only one remaining in petitioner's custody; £1,500 was given to the petitioner and also his costs of the suit in addition to those which had been taxed against the co-respondent; the balance was invested in the purchase of a life annuity for

the respondent, to be paid to her as long as she lived chastely and did not become the wife of the co-respondent; and in the event of her breaking either of those conditions, to be paid to the petitioner. *Meyers v. Meyers*. 636

2. In a suit for dissolution of marriage brought by the wife, a decree absolute having been made, application was made to the court to vary the settlements executed on the marriage of the parties:

Held, that the object of the court, in varying the provisions of a settlement, should be to prevent, as far as may be just and practicable, the innocent party being damaged, in a pecuniary sense, by the decree of dissolution. It will not deprive the father of the power of exercising parental judgment and discrimination with regard to his children, except so far as is inevitable from their remaining in the custody of their mother. *Maudslay v. Maudslay*. 638

ANIMALS.

1. A person who sends animals destined for human food to a public market for sale impliedly represents that they are, so far as he knows, not infected with any contagious disease dangerous to animal life; and a condition of sale that they are to be "taken with all faults" does not negative or qualify this representation. *Ward v. Hobbs*. 140, 143 *note*.
2. Liability for destroying by poisoned meat. *Daniel v. Janes*. 320, 323 *note*.

See GAME LAWS, 458.

APPEAL.

1. By an order of reference made by consent, and before the coming into operation of the Judicature Acts, it was ordered that neither the plaintiffs nor the defendants should bring any writ of error against each other concerning the matters referred. The arbitrator made an award dependent on the opin-

ion of the court upon a special case stated by him. The court gave judgment for the plaintiffs. The defendants appealed:

Held, in the Court of Appeal, that no appeal could be brought. *Jones v. Victoria, etc.* 125

2. The time within which an appeal must be brought from an order made under the Trustee Relief Act is twenty-one days. *Matter of Baillie's Trust.* 710

3. Where an order on an interlocutory application and an order on further consideration are made at the same time and are included in one order, an appeal from the order on the interlocutory application must nevertheless be brought within twenty-one days, although such order in effect determines the issue in the cause. *Cummins v. Harron.* 712

ASSESSMENT.

See MUNICIPAL CORPORATIONS, 181.

ASSIGNMENT.

1. W. and A. were appointed joint receivers in a partnership suit, and were ordered (after payment of costs) to pay the residue of the moneys received by them to the partners according to their respective rights. L., one of the partners, afterwards assigned his share of the moneys to W., in consideration of advances made by him. After this L. signed an order to W., requesting him "to pay the balance of money due to me" to G. W. accepted this order in writing, undertaking thereby to pay "the balance due to you" to G.:

Held, upon the construction of this acceptance, and upon the evidence, that "the balance" intended was the balance remaining after satisfying W.'s own claim. *Matter of Garrard.* 792, 795 *note.*

See FRAUD, 68, 90 *note.*

ATTORNEYS.

1. In making an order for taxation under the Attorneys and Solicitors Act (6 &

7 Vict. c. 73), s. 38, it is discretionary with the court whether or not to add the order for the delivery up of papers.

2. A solicitor delivered to his client a bill of costs incurred in pending suits in which he afterwards, with his client's knowledge, incurred further costs. While the suits were still pending the client obtained an order of course for taxation and delivery up of papers, whereupon the client delivered a bill for the further costs. On a motion to discharge the order on the ground that the solicitor had a lien on the papers for the further costs:

Held, that the order should be amended so as to include both bills.

3. *Semble*, the proper form of order in such a case would be a simple order for taxation, without ordering the papers to be delivered up. *Matter of Jarman.* 733

ATTORNEYS AND COUNSELLORS.

See FRAUD, 68, 90 *note.*

AUCTIONEER.

1. In an action for the non-delivery of goods, it appeared that the defendants, who were auctioneers, issued printed catalogues, headed "Great Western Railway Company. Catalogue of unclaimed property, &c., which will be sold by auction by Messrs. H. & E. (the defendants), on Tuesday, November 7th, and following day. By order of the directors of the above company," &c. The catalogue contained, amongst others, the following conditions: "The lots to be cleared away within three days after the sale at the purchaser's expense, &c. If any deficiency shall arise, or from any cause the auctioneer shall be unable to deliver any lot or portion of a lot, then in such case the purchaser shall accept compensation. Upon failure of complying with the above conditions, the money deposited in part payment shall be forfeited. All lots unclaimed within the time aforesaid shall be resold by public or private sale without further notice,

and the deficiency made good by the defaulter."

The plaintiff attended the sale, received a catalogue, bought one of the lots, and paid a deposit. He did not fetch the goods away on Saturday (the last of the three days for clearing), but went for them on the Monday following, when he was told by one of the defendants that the lot had been delivered to another person. There was evidence that the lot was seen on Saturday morning in the defendants' possession as if ready for delivery, and that it was usual to delay the delivery of large lots like it till the smaller lots had been delivered. The plaintiff having been nonsuited:

Held, first, that on the face of the catalogue and conditions, there was evidence that the defendants contracted personally with the plaintiff for the delivery of the goods purchased by him. Secondly, that the condition as to clearing the lot within three days was not a condition precedent to the plaintiff's right to claim delivery. *Woolfs v. Horne.* 154

B.

BAILMENT.

See INNKEEPERS, 558, 561 *note*.

BANK.

See ASSIGNMENT, 792, 795 *note*.

BANKRUPTCY.

1. In the 1st section of the Bills of Sale Act, 1854, the "time of such bankruptcy" means the time of the act of bankruptcy.
2. The grantee, under an unregistered bill of sale, took possession of the property comprised in it before the filing of a liquidation petition by the grantor. The day before possession was taken the grantor had committed

an act of bankruptcy of which the grantee had no notice:

Held, that the title of the grantee was defeated by virtue of the relation back of the title of the trustee in the liquidation to the earlier act of bankruptcy.

3. The protecting clauses of the Bankruptcy Act, 1869, ss. 94 and 95, have no operation as regards a transaction which is made void by the Bills of Sale Act.
4. Leave to appeal to the House of Lords refused.
5. The principles upon which the court acts in granting or refusing leave to appeal to House of Lords explained. *Ex parte Athwater.* 768

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BASTARDY.

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BILL OF LADING.

1. When drawer entitled to have bill of exchange paid out of sale of property. *Matter of Watson.* 764
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1. When *bona fide* purchaser of vessel from fraudulent one obtains good title.
The Horlock. 626

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See CORROBORATION, 284, 288 *note*; 289, 296 *note*.

BUILDING SOCIETY.

1. The defendants were trustees of a benefit building society, enrolled pursuant to 6 & 7 Wm. 4, c. 32, and the statement of claim alleged that the plaintiff became a member of the society, and was the holder of first-class shares, and during his membership paid his subscriptions, that by a rule of the society any member holding first-class shares, desiring to withdraw from the society, should, after giving three months' notice, receive back the whole amount paid by him for subscriptions; that the plaintiff gave the requisite notice of withdrawal, and there then became due to him from the society the sum of £35 8s. 6d., which the plaintiff was entitled to be paid according to the rule:

Held, upon demurrer, that the statement of claim was bad; for it alleged a dispute between a building society and a member thereof, and a rule must be assumed to exist referring disputes of that kind to arbitration or justices, pur-

suant to 10 Geo. 4, c. 56, s. 27 (incorporated by 6 & 7 Wm. 4, c. 32, s. 4), and the mere notice of withdrawal given and assented to would not prevent the application of the rule. *Huckle v. Wilson.* 349

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C.

CARRIERS.

1. The Traffic on Railways and Canals Act, 1854 (17 & 18 Vict. c. 31), applied to the whole traffic upon railways, and not merely to their passenger traffic, but only applied to traffic on railways or canals.
2. The Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 31, extends the act of 1854 to steam vessels, and the traffic carried on thereby, which vessels railway companies own or work.
3. The Railways Regulation Act, 1871 (34 & 35 Vict. c. 119), s. 12, applies to cases where a railway company, under a contract to carry persons, animals, or goods by sea, procures the same to be carried in a vessel not belonging to the company nor worked by the company, and the company becomes liable for damage in like manner as if the vessel had belonged to the railway company.
4. The 7th section of the act of 1854 did not allow of the limitation of the liabilities of railway companies, except by such "conditions" as should be held by a court or judge to be just and reasonable, and be embodied in a special contract, which should be signed by the owner of the goods.
5. The word "servants" in the Railway and Canal Traffic Act, 1854, s. 7, means not merely servants, properly so called, but also the agents (not strictly servants), employed by railway companies to do for them work which they

are under a contract with others to perform.

6. A railway company made contracts to carry animals from a port of Ireland to a town in England, on "through" tickets. The paper or ticket contained, in substance, the following condition: "that with respect to any animals, &c., booked through, by them or their agents, for conveyance partly by railway and partly by sea, or partly by canal and partly by sea, such animals, &c., will only be so conveyed on the condition that the company shall be exempt from any liability for any loss or damages which may arise during the carriage of such animals, &c., by sea, from the act of God, &c., accidents from machinery, &c., and all and every other damages and accidents of the seas, rivers and navigation of whatever nature and kind soever, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. Nor will the company be responsible for loss of, or damage to, animals, &c., arising from damages or accidents of the sea, or of steam navigation, the act of God, &c., jettison, barratry, collision, improper, careless, or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master or any of the officers or crews of the company's vessels."

Held, that the words "master and crew of the company's vessels," in this condition applied to all such vessels as the company should employ, and not merely to vessels owned or worked by the company itself; and that the condition was unreasonable and void.

7. If a railway company is guilty of an illegality by working steamboats, not being authorized by law to work them, it cannot set up such illegality as an answer to a claim for damages arising out of the working of such steamboats. *Dolan v. Midland Railway*. 48, 67 note.

8. On the deposit of articles at the cloak room at a railway station, a charge is made of 2d. for each, and the depositor receives a ticket, on the face of which are printed the times of opening and closing the cloak room and the words "See back," and on the back there is a notice that the company will not be responsible for any package exceeding

£10. A placard upon which is printed in legible characters the same condition is also hung up in the cloak room.

The plaintiff deposited his bag, of value exceeding £10, in the defendants' cloak room, paid 2d., and received a ticket. The bag was lost or stolen. In an action to recover its value the plaintiff swore that he took the ticket without reading it, imagining it to be only a receipt for the money paid for the deposit of the article, or as evidence that the company had received the article, that he did not read the condition at the back of the ticket, nor did he see the notice hung up in the cloak room. The judge left two questions to the jury.—1. Did the plaintiff read or was he aware of the special condition upon which the article was deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself aware of the condition? The jury answered both the questions in the negative, and judgment was directed for the plaintiff.

Held, by Mellish and Baggallay, L.JJ., that there ought to be a new trial, on the ground that there had been a misdirection by the judge, inasmuch as the plaintiff could be under no obligation to read the condition; and that the second question left to the jury ought to have been, whether the company did that which was reasonably sufficient to give the plaintiff notice of the condition.

9. *Held*, further by Bramwell, L.J., that, on the above facts, it was a question of law, and that judgment ought to be entered for the defendants. *Parker v. South Eastern, etc.* 849

10. The defendants caused to be shipped on board the plaintiff's vessel bales of palm baskets and barrels of oil, under a bill of lading containing the clause, "Not accountable for rust, leakage or breakage." During the voyage some of the oil escaped from the barrels, and damaged the palm baskets:

Held, that the clause in the bill of lading, exempting the plaintiff from responsibility for "leakage," did not extend to damage caused by the oil which had escaped from the barrels, and that the plaintiff was liable to compensate the defendants for the in-

jury done to the palm baskets. *Thrift*
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versed, 8 Q. B. Div. 150

CHARTERPARTY.

See ADMIRALTY, 198, 208.

CHATTEL MORTGAGE.

1. The act 29 & 30 Vict. c. 96, s. 4—which requires the registration of a bill of sale under 17 & 18 Vict. c. 36 to be renewed every five years, in default of which the registration ceases to have any effect—is equally imperative when the grantee, before the period for renewal, assigns his interest under the bill of sale to a third person; and the assignee, if the registration is not renewed, has no title as against an execution creditor. *Karet v. Kosher, etc.*, 160, 164 note.

See BANKRUPTCY, 763.
BILL OF SALE.

CITY.

See MUNICIPAL CORPORATIONS.

CLOSED.

1. When place for selling liquor is. *Tussell v. Ovenden*. 175

COLLISION.

See ADMIRALTY, 581, 607, 615, 619.

COMMONS.

1. Where the lord of a manor has appropriated by leasing and also has granted out by copy of court roll portions of the waste, the fact that there has been a sufficiency of common of pasture during ten years, is evidence that the inclosures have not interfered with the rights of the commoners.
2. In 1751 the lord of the manor of C. demised a brick-kiln then standing on the waste thereof, with liberty to inclose a piece of land not exceeding half an acre, and to dig earth for the use of the kiln; this lease, after its expiration, was renewed from time to time, and meanwhile leases of other parts of the waste were granted for the purpose of erecting thereon kilns and of digging clay. During the currency of the lease made in 1751 presentments were made by the homage of encroachments on the waste by strangers; but no objection was made to the granting of the leases, and the commoners bought bricks at the kilns:
Held, that the granting of the leases ought to be referred to a legal origin, and that there was evidence sufficient to establish that the lord of the manor had by custom the right to approve, so that he left a sufficiency of turbary and estovers to the commoners.
3. By a deed, made in 1614, certain copyhold land of the manor of C. was enfranchised, and thereby the lord granted to G. M. "all and all manner of turbaries, digging and carrying of turfs, estovers, and common of estovers, heath, and fern . . . in such sort, nature, quality, and condition as the freeholders and tenants in free so-

cage of the said manor, within the parish of C. aforesaid, have used and enjoyed the same":

Held, that the terms of the deed afforded no evidence that at the time of its execution the freeholders of the manor had larger rights of common than the copyholders: and

4. *Held*, further, that the deed did afford evidence that the grant of common of turbary and estovers to G. M. was made subject to the customs of the manor; and, therefore, that the lord could approve as against the successor in title of G. M. *Lancelles v. Onslow*. 207

CONDITION PRECEDENT.

See AUCTIONEER, 154.

CONSOLIDATION OF CORPORATIONS.

See ULTRA VIRES, 737.

CONSTRUCTION.

See STATUTES, 1.

CONTRACT.

See STATUTORY DUTY, 541, 549 *note*.

CONTRACTOR.

See NEGLIGENCE, 327, 332 *note*.
STATUTORY DUTY, 541, 549 *note*.

CORPORATIONS.

1. The nominal capital of a limited company was divided into shares of £32

each, all of which were subscribed for. On all the shares (except a few which were paid up in full) £29 per share was paid, leaving £3 per share to be called up. The capital having been partially lost through the depreciation of the property which represented it, the company desired to write off the loss, and for that purpose proceeded to take steps under the Companies Act, 1867, for reducing their nominal capital. They accordingly passed a resolution that the nominal capital should be reduced to a specified amount, and that each £32 share should be reduced to £23 by the extinction of £9 per share, to the intent that the existing liability of £3 per share on all the shares, except those fully paid up, should be preserved. They then presented a petition for an order for confirming the resolution, the minute required by sect. 15 of the act stating that the amount of the reduced capital was divided into shares of £23 each (instead of the original £32), on all of which (except the fully paid-up shares) the sum of £20, and no more, was to be deemed to have been paid up:

Held, upon an application by the company, by summons, for liberty to proceed with the petition,

2. That the court had no jurisdiction to sanction the proposed reduction of capital, inasmuch as the act contained no provision for enabling a company whose paid-up share capital had been partially lost, as in the present instance, to write off that loss by reducing the nominal amount of each share.
Ebbw Vale, etc., Co. 726

See DIRECTORS, 798.

MUNICIPAL CORPORATIONS.

STATUTORY DUTY, 541, 549 *note*.

STOCKHOLDERS, 215.

ULTRA VIRES, 737.

CORROBORATION.

1. Upon the hearing of a complaint in bastardy, the statement of the mother as to the paternity of the child may be sufficiently corroborated by the evidence of acts of familiarity between her and the defendant, although these

acts have taken place at a time before the child could have been begotten; for evidence of this kind is a corroboration of the mother "in some material particular" within the meaning of the Bastardy Laws Amendment Act, 1872, s. 4. *Cole v. Manning*. 284, 288, *note*.

2. In an action for breach of promise of marriage, the plaintiff having sworn that the defendant had seduced her and had repeatedly promised to marry her, her sister gave evidence that, at an interview she had with the defendant when she discovered her sister's condition, she upbraided him for the ruin and disgrace he had brought upon the plaintiff, when he said "he would marry her and give her anything, but I must not expose him." The sister further stated that, after the plaintiff's confinement, she overheard a conversation between the plaintiff and the defendant in the course of which the plaintiff said to the defendant, "You always promised to marry me, and you don't keep your word," when the defendant said he would give her some money to go away.

Held, reversing the judgment of the Common Pleas Division, that this was "material evidence in support of the promise," to satisfy the requirement of 32 & 33 Vict. c. 68, s. 2. *Bessela v. Sterns*. 289, 296 *note*.

COSTS.

1. A bill was dismissed by a Vice-Chancellor without costs. The plaintiff appealed against the whole decree, and his appeal was dismissed:

Held, that the court had no power to vary the order of the Vice-Chancellor by directing that the bill should be dismissed with costs. *Harris v. Aaron*. 686

See ATTORNEYS, 733.

SECURITY FOR COSTS, 709.

COUNSELLORS.

See ATTORNEYS, 733.

COUNTY.

See MUNICIPAL CORPORATIONS.

COVENANTS.

1. The owner of an estate granted a lease of a plot of ground to A., who covenanted that he, his executors, administrators, or assigns, would not during the term do on the premises anything which should be an annoyance to the neighborhood or to the lessor or his tenants, or diminish the value of the adjoining property, nor build, nor allow to be built, on the ground any building or erection without first submitting the plans to the lessor and obtaining his approval. The landlord some years afterwards granted a lease of an adjoining plot to B., who entered into a similar restrictive covenant. Within twenty years A. commenced, with the approval of the lessor, to build upon his ground so as to darken the windows of B.'s house.

On bill by B. to restrain A. from erecting and the lessor from approving the building objected to:

Held, that B. was not entitled to relief either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in A.'s lease enured for B.'s benefit. *Master v. Hansard*. 671

See SUPPORT, 468, 478 note.

CREDITOR.

See CHATTEL MORTGAGE, 160, 164 note.

CRIMINAL LAW.

1. *False pretences*. C. was convicted of obtaining potatoes from the prosecutor by falsely pretending that he then was in a large way of business, that he was in a position to do a good trade in potatoes, and that he was able to pay for large quantities of potatoes as and when the same might be delivered to him. The evidence that C. had so pretended was the following letter writ-

ten by him to the prosecutor: "Sir,— Please send me one truck of regents and one truck of rocks as samples, at your prices named in your letter; let them be good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours, &c.

"P. S. I may say if you use me well I shall be a good customer. An answer will oblige saying when they are put on."

Held, affirming the conviction, that the words of the letter were fairly and reasonably capable of a construction supporting the pretences charged, and that it was a question for the jury, whether the writer intended the prosecutor to put that construction upon them. *Regina v. Cooper*. 234

2. *Malicious mischief*. The placing of poisoned flesh in an inclosed garden, for the purpose of destroying a dog which was in the habit of straying there, is not an offence punishable under 24 & 25 Vict. c. 97, s. 41.
3. But, *semble*, that it is within 27 & 28 Vict. c. 115, s. 2. *Daniel v. Jones*. 820, 828 note.
4. *Obscene literature*. In an indictment for the publication of an obscene book, the fact that the book is described by its title only, without setting out any of the words charged as obscene, is no ground for a motion to quash the indictment or arrest the judgment.
5. *Semble*, that such omission of the words charged as obscene is not open to objection by demurrer or otherwise. *The Queen v. Bradlaugh*. 268, 274 note.
6. *Perjury*. Upon an indictment for perjury, charged as having been committed on the trial of an action in the High Court of Justice, the existence of the action is sufficiently proved by the production, by the officer of the court, of the copy writ filed under Order v, Rule 7, and the copy pleadings filed under Order XLI, Rule 1, of the Rules of the Supreme Court. *Regina v. Scott*. 198
7. *Place of amusement*. The defendant kept a skating rink within twenty miles of London. The rink was inclosed by a wall, and was partly roofed with canvas and partly open to the air. It

was open for skating in the daytime and in the evening. In the daytime there was no music. In the evening a band played operatic and dance music while the skaters skated. The defendant had no license under 25 Geo. 2, c. 36:

Held, that the defendant might properly be convicted of keeping a place for public entertainment of a like kind to music and dancing without a license.

8. *Semble*, he might also be convicted of keeping a place for public music without a license. *Regina v. Tucker*. 193

9. *Rape*. The prisoner professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen, consulted him with respect to illness from which she was suffering. He advised that a surgical operation should be performed, and under pretence of performing it, had carnal connection with the prosecutrix. She submitted to what was done, not with any intention that he should have sexual connection with her, but under the belief that he was merely treating her medically and performing a surgical operation, that belief being wilfully and fraudulently induced by the prisoner:

Held, that the prisoner was guilty of rape. *Regina v. Maltby*. 189, 192 note.

See CORROBORATION, 284, 288 note; 289, 296 note.

CUSTOM.

See EVIDENCE, 207.

D.

DAMAGES.

1. A contract for the erection of buildings provided that they should be completed by the 25th of December, and that in default thereof the contractors should forfeit to the employer £10 per week for every week after that date during which the buildings should re-

main unfinished; also that, if the contractors were prevented by bankruptcy or any other cause from completing, the employer might rescind, and that the moneys then already paid should be considered the full value of the works executed. There were various other stipulations, and a final provision that, in case the contract should not be in all things duly performed by the contractors, they should pay to the employer £1,000 as and for liquidated damages.

Before the 25th of December the contractors filed a liquidation petition. Their trustees carried on the works for a time, and then abandoned the contract. Another builder was employed to complete the works, which were not finished till long after the 25th of December:

Held, that the £1,000 was in the nature of a penalty, and that the employer was entitled to prove in the liquidation only for the actual damage he had sustained by the delay in the completion of the works. *Matter of Newman*. 676, 685 note.

DEVISE.

See WILLS, 761.

DIRECTORS.

1. Action brought by the plaintiff under the Companies Act, 1867, s. 38, to recover the amount paid by him on certain shares taken by him in the L. Company on the ground of the fraud of the defendants (promoters of the company), in omitting from the prospectus two contracts entered into by them as promoters—the one a contract between the defendants C. & P. and one S., for the purchase of certain foreign concessions for the construction of tramways which the company was afterwards incorporated to make and work; the other a contract between the defendants, C. & P. and the defendant G., as to certain payments to be made by C. & P. to G. in consideration of his obtaining for them a contract from the company for the construction of the tramways, by means of which fraud the plaintiff had been induced to take the shares, which proved worthless. The jury found

that these contracts were material to be made known to the intended shareholders of the company :

Held, by the Common Pleas Division and in the Court of Appeal by Cockburn, C.J., and Brett, L.J., that the contracts ought to have been specified in the prospectus, and that the defendants were liable; Kelly, C.B., and Bramwell, L.J., dissenting :

2. *Held*, by the Common Pleas Division and in the Court of Appeal, by Cockburn, C.J., Bramwell and Brett, L.J.J., that the words "knowingly issuing" in s. 38 mean intentionally issuing a prospectus without inserting the contracts which are required by that section to be specified, although they are omitted under the *bona fide* belief that it is unnecessary to specify them.

3. At the trial the judge directed the jury that if the real damage occasioned to the plaintiff by the defendants' fraud was the price he paid for the shares, he was entitled to recover that amount. The jury assessed the damages at the price paid by the plaintiff :

Held, by Cockburn, C.J., Bramwell and Brett, L.J.J., affirming the judgment of the Common Pleas Division that the direction was right, and that the shares taken by the plaintiff being worthless he was entitled to recover the amount paid by him for them : Kelly, C.B., dissenting. *Twycross v. Grant*, 887

4. The L. Railway Company had power under its acts to issue £100,000 preference shares and a large amount of ordinary shares. By an act passed in 1864, it was amalgamated, together with other companies, with the C. Company, at which time it had issued £85,000 preference shares, which were to rank as No. 1 Preference Stock, and £80,000 ordinary shares, which were to rank as No. 2 Preference Stock, and power was reserved by the act to the C. Company to raise any capital which any of the amalgamated companies had power to raise before the amalgamation. The directors, under a *bona fide* belief that they had power to raise the remaining £15,000 preference shares of the L. Company, and to make them rank with the £85,000 No. 1 Preference Stock, issued £15,000 preference stock, and described them in the cer-

tificates, which were signed by the directors and the secretary, as "No. 1 Preference Stock," and some of this stock was purchased by the plaintiffs.

A scheme was filed in Chancery for arranging the affairs of the C. Company, and it was decided by the court that the new stock was not No. 1 Preference Stock, but ranked below both it and No. 2 Preference Stock.

On a bill being filed by the plaintiffs, alleging that they had been deceived by the form in which the stock had been issued and the certificates made, and praying that the company, the directors, and secretary might be held responsible for the misrepresentation :

Held, by the Master of the Rolls, that the company, and also the directors and secretary, were liable to make good the misrepresentation to the plaintiffs, and either to issue No. 1 Preference Stock to them or repay them their purchase-money.

5. But the Court of Appeal, being of opinion, on the result of the evidence, that the plaintiffs did not suppose they were purchasing part of the £85,000 No. 1 Preference Stock, but a new stock which ranked with the No. 1 Preference Stock, *held* that the plaintiffs had not been deceived by any misrepresentation of fact, but that there had been a common misconception of law, and they accordingly reversed the decree of the Master of the Rolls, and dismissed the bill with costs. *Eaglesfield v. Marquis of Londonderry*, 647, 670 note.

6. A lease of an island in the West Indies containing extensive deposits of phosphate of lime was, on the 30th of August, 1871, contracted to be sold subject to the sanction of the court, to a person who was in fact the agent or trustee for a syndicate or group of speculators, and the contract was confirmed by the judge in chambers on the 15th of September. This agent, on the 20th of September, agreed to sell the property to a trustee for the plaintiff company, registered the same day, for double the price at which he had purchased, and which had been paid. The main object of the new company, as stated by the memorandum of association, was to acquire the lease of the island and work the phosphates. There were five directors, who were named in the articles of association. Of these, two were away

from England when the company was formed, and took no part in the management till after the purchase was completed; another was the trustee who purchased on behalf of the syndicate; and another, by arrangement made before the registration of the company, obtained his share qualification by gift or loan from the principal member of the syndicate, who in fact directly or indirectly selected all the directors. The fifth was independent of the syndicate. The three last mentioned directors, at a board meeting on the 29th of September, adopted the contract for purchase:

Held, by Malins, V.C., (1) that the syndicate must be considered to have purchased the property as from the 30th of August, and, therefore, that from that date they were at liberty to dispose of it as they thought proper; and that, inasmuch as there was no one who, as representing the future company, could then treat the syndicate as being in a fiduciary relation towards him, the company were not entitled to set aside the contract because there was no disclosure of the price at which the syndicate had purchased, or to say that the syndicate were trustees for the company of the difference between the two purchase-moneys: (2) that the fact that the principal or active member of the syndicate had, as early as the 12th of September, commenced negotiations with some of the persons who afterwards became directors with a view to the formation of the company, did not make the syndicate promoters or agents of the company: (3) that though the acceptance of the contract for purchasing the lease of the island was the principal object for which the company was formed, it did not require more than the quorum to make it valid: (4) that when the company had entered into possession of the property in pursuance of a contract made on behalf of the company by three of the directors named in the articles of association, it was not open to the company afterwards to object as against the vendors to the validity of the contract, on the ground that the three directors did not legally form a quorum of the body, or that one of the three was, as trustee for the syndicate, vendor, and, as director of the company, purchaser: (5) that the company was not entitled to set aside the contract on the ground that the

prospectus, as framed by the syndicate, contained misstatements of the following nature, viz., that an erroneous inference had been drawn from the liquidator's statement as to results of the working of the phosphate on the island which gave a more favorable appearance than the facts justified: That an estimate of the amount of phosphate on the island, deduced from a survey, was referred to in a manner which made it appear as if the survey had been made for the purposes of the company, when it was in fact made several years before, since which time the phosphate had been extensively worked, it not being shown that there was not still on the island the amount of workable phosphate mentioned in the survey: That it was stated that the directors had entered into a provisional contract for the purchase of a lease of the island, though all that had been done was that three out of the five members of the board had passed a resolution adopting, without investigation, a contract prepared before the formation of the company, and made between one of the three directors, the trustee for the vendors, and a nominee of the vendors, who acted as trustee for the future company.

7. *Held*, on appeal, that the syndicate, being the promoters of the company, stood in a fiduciary relation to it, and were bound to make a full and fair disclosure of their interest in the property; and that as they had suppressed the facts that they were the real vendors, and that they gave for the property only half what the company were going to give, and had obtained the acceptance of the contract from such a board as they created, and had inserted in the prospectus statements which would lead intending shareholders to believe that the contract had been approved by all five directors, there was no contract binding on the company, and the sale to the company must be set aside, and judgment given against the members of the syndicate for repayment of the purchase-money:
8. *Held*, also, that the estate of a deceased member of the syndicate was liable on the ground that he was a partner, and that the action therefore did not die with him.

9. *Seemle*, also, that directors not being members of the syndicate were not liable. *Sombrero Phosphate, etc., v. Er-langer.* 798

DIRECTORY.

See STATUTES, 462.

DISCHARGE.

See RELEASE, 777, 790 *note*.
ULTRA VIRES, 787.

DISCOVERY.

1. Interrogatories asking the defendant whether he has composed or published an alleged libel are objectionable, and will be struck out without requiring the defendant to object to them by way of answer. *Atherley v. Harvey.* 244

DISEASED ANIMALS.

See ANIMALS, 140, 148 *note*.

DIVIDENDS.

See EXECUTORS AND ADMINISTRATORS, 693.

DIVORCE.

See ALIMONY, 636, 638.
CORROBORATION, 284, 288 *note*; 289, 296 *note*.
HUSBAND AND WIFE, 500.
NAME, 745.

DUTY.

See STATUTORY DUTY, 541, 549 *note*.
21 ENG. REP. 111

E.

EASEMENT.

See COMMONS, 207.
COVENANTS, 671.
WAY, 845, 851.

EDUCATION.

See SCHOOLS, 181.

EMINENT DOMAIN.

1. Where lands have been taken compulsorily under the powers of a railway act, and retained by the company with the *bona fide* intention of using them for the purposes of the railway, and at the expiration of the period for the sale of superfluous lands, though they are not in actual use, there is a reasonable prospect of their being ultimately required and used for the purposes of the railway, such lands are not superfluous lands within sect. 127 of the Lands Clauses Consolidation Act. *Hooper v. Great Western, etc.* 145
2. By s. 6 of 10 Vict. c. 15, the undertakers are authorized to open and break up the soil and pavement of the several streets within the limits of their special act and to lay down pipes for supplying gas. Sect. 7 provides "that nothing herein shall authorize the undertakers to lay down or place any pipe or other works, into, through, or against any building, or in any land not dedicated to the public use, without the consent of the owners and occupiers thereof . . .
3. A road passed alongside the plaintiff's premises, and over certain arches occupied by him as cellars. The defendants, a company constituted under a local act incorporating 10 Vict. c. 15, in opening and breaking up the soil of the road for the purpose of laying down gas-pipes, damaged the arches:
Held, that the arches were buildings within s. 7, and that the defendants could not justify breaking through them. *Thompson v. Sunderland, etc.* 534

EVIDENCE.

1. The court rolls of the manor of C. contained twelve entries relating to grants by the lord of parcels of the waste; the entries commenced in 1664 and ended in 1858 (with a break of many years), and in ten of them it was stated that the homage consented to the grant; the land included in the whole of these grants amounted to rather more than 51 acres, the extent of the waste being about 4,500 acres. The homage was composed wholly of copyholders:

Held, that the entries afforded evidence of a custom within the manor to grant parcels of the waste with the consent of a homage of copyholders, and that the custom was valid as against the freeholders having rights of common over the waste. *Lascelles v. Ouslow*. 207

See CORROBORATION, 284, 288 *note*; 289, 296 *note*.

CRIMINAL LAW, 198.

EXCISE.

1. The occupier of a draper's and grocer's shop, who is licensed to sell in the same shop wines and spirits not to be consumed on the premises, cannot be convicted under the Licensing Act, 1874 (37 & 38 Vict. c. 49), ss. 3, 9, for keeping open premises for the sale of intoxicating liquors after prohibited hours, upon mere proof that the shop is kept open after the prohibited hours, without any sale or exposure for sale of intoxicating liquor.
2. The appellant was charged under 37 & 38 Vict. c. 49, ss. 3, 9, with keeping open premises (elsewhere than in the metropolitan district), for the sale of intoxicating liquors by retail after ten o'clock in the evening. It appeared that he occupied a shop where he sold drapery, grocery, and wines and spirits not to be consumed on the premises. One evening, after ten o'clock, his shop was found open. There was no proof of any sale or exposure for sale of intoxicating liquors after ten o'clock, nor that liquors were then kept in any other place in the shop except in a large wooden case closed with shutters

and a lock, which was standing in the shop with a printed notice on it, informing customers that wines and spirits could not be supplied after ten o'clock in the evening:

Held, that he was not liable, for it must be taken that the premises, as regarded the sale of intoxicating liquors, were *bona fide* closed at ten o'clock. *Tussell v. Ovenden*. 175

3. The term "licensed premises," as used in the Licensing Act, 1872, s. 12, means licensed premises while they are open to the public for the purposes of the license; consequently a licensed person who is found drunk on licensed premises in his own occupation, after licensed hours and when the premises are closed to the public, is not liable to a penalty under s. 12. *Leater v. Torrens*. 182

EXECUTION.

See SHERIFF, 550, 553 *note*.

EXECUTORS AND ADMINISTRATORS.

1. Where a decree has been made for the administration of the estate of a deceased person, and the assets in hand have been distributed among his creditors, who have come in and proved, and at a later period further funds come in, and some only of the creditors who had proved come forward in answer to advertisements, the creditors who thus claim payment at the later period are not entitled to have the whole of the new fund applied so far as it will extend in payment of their claims, but only to receive ratable proportions of it according to the proportion which their debts bear to the total amount of the debts. *Ashley v. Ashley*. 698

See WILLS, 733.

EXPECTANCY.

See FRAUD, 68, 90 *note*.

EXPECTANT HEIRS.

See FRAUD, 68, 90 note.

F.**FALSE PRETENCES.**

See CRIMINAL LAW, 234.

FEEES.

See SHERIFF, 297, 304 note ; 550, 553 note.

FEIGNED ISSUE.

1. A trial by jury cannot be heard before a judge of the Chancery Division. Actions commenced in the Chancery Division, if they are to be tried by a jury, must be set down in the general list, to be tried by one of the judges of the Common Law Divisions. *Warner v. Murdoch.* 687

FOOD.

*See ADULTERATION OF FOOD, 249.
ANIMALS, 140, 143 note.*

FORFEITURE.

See ADMIRALTY, 595, 604.

FRAUD.

1. Mere inadequacy of price will entitle an expectant heir to apply to the Court of Equity to set aside (on terms) the sale of a reversion, and the *onus* of proving the transaction fair, and the price sufficient, is on the purchaser.
2. The repeal of the Usury Laws has not affected the jurisdiction of the

Court of Chancery to give adequate protection, in such cases, to expectant heirs, or persons under pressure.

3. A settlement of an estate made on the marriage of J. B. and M. L. charged a sum of £300 a year as an annuity in favor of the intended wife for her life, and a sum of £3,000 for portions for younger children. There were six younger children. J. B. got into money difficulties, and disposed of his own interests in the estate. The eldest son of J. B. became possessed (his father being still alive) of the estate itself, and sold it to O'R., subject to the charges upon it for the wife's annuity, and the children's portions. Some of the children sold their expected portions to O'R., and to another person, for varying sums of money. J. B., the father, proposed to O'R. to purchase the portion of John, the youngest but one of the family. The father was then sixty-one years of age, and a stockbroker (who knew nothing of the state of J. B.'s health) valued the portion (£500) at £326. O'R. refused to give more. The negotiations for the sale lasted some weeks, the son all that time residing with the father at Dover. The son came of age on the 11th of April, 1870, went over to Ireland on the 18th of April, saw O'R. and his solicitor on the 20th of April, saw the deed on the 28th of April, was stated to have examined it, and expressed his approval of it (but that was denied), and executed it on the 30th of April, 1870. He never had a separate solicitor, or any one to act for him in the character of an independent adviser. The purchase-money was to be paid by yearly instalments. These were regularly paid till the end of 1874, and accepted by the son. At that time the son filed his bill to set aside the sale as fraudulent and void, and to have an account. The Master of the Rolls in Ireland had dismissed the bill; the Court of Appeal reversed that decision:

Held, by LORDS BLACKBURN and GORDON, that, there being no evidence of fraud, the bill could not, under the circumstances, be sustained, and the decision of the Court of Appeal in Ireland was reversed.

4. *Diss.*, LORD HATHERLEY, who was of opinion that though there was no evidence of fraud or misconduct on the part of the purchaser, still that the

circumstances of the case brought it within the rule of equity, that protection ought to be afforded to expectant heirs in cases of this kind, and that, as the young man here had not had the protection of a separate and independent adviser, the whole transaction must be opened. *O'Rorke v. Bolingbroke*. 68, 90 note.

5. *Where *bona fide* purchaser of vessel from fraudulent one obtains valid title. *The Horlock*. 626

See ADMIRALTY, 595, 604.

CHATTEL MORTGAGE, 160, 164 note.

DIRECTORS, 387, 647, 670 note, 798.

FRAUDS, STATUTE OF.

1. The defendants, a company incorporated under the Companies Act, 1862, entered into negotiations with the plaintiffs to employ them as managers for five years. A draft agreement was prepared and submitted to the plaintiffs; they objected to some of its terms, and thereupon the directors of the defendants' company wrote out a paper modifying the draft agreement in some particulars, but concluding with the words "all other provisions as in draft." The plaintiffs agreed to the draft agreement as modified by this paper. The secretary of the defendants' company entered in the minute book a resolution that the plaintiffs having signified their willingness to undertake "the management of the company's works upon the terms of the draft agreement submitted to them by the board, it was resolved that the said agreement be engrossed in duplicate, signed, sealed, and executed." At the next meeting of the directors of the defendants' company the chairman signed the above resolution pursuant to the Companies Act, 1862, s. 67:

Held, in the Queen's Bench Division by Mellor and Lush, JJ., that there was a valid contract within the Statute of Frauds, s. 4, by the defendants to employ the plaintiffs during five years: for the terms of the service were completely ascertained when the plaintiffs assented to the draft agreement as modified by the paper, and it was immaterial that the directors of

the defendants' company intended the contract as finally arrived at to be afterwards "engrossed in duplicate, signed, sealed, and executed;" and the draft agreement and the paper modifying it might be identified by parol as the draft agreement referred to in the resolution entered in the minute book; and although the signature of the chairman was affixed to the minute book for the purpose of verifying the accuracy of the entry therein contained, pursuant to the Companies Act, 1862, s. 67, it nevertheless operated as an admission of the contract contained in the draft agreement and the paper, and was sufficient to satisfy the Statute of Frauds, s. 4. *Jones v. Victoria, etc.* 124

FREIGHT.

1. Power to compel two companies to carry *pro rata*. *Matter of Toomer*. 550

See ADMIRALTY, 198.

G.

GAME LAWS.

1. It is no defence to an information under the Wild Birds Protection Act, 1876 (39 & 40 Vict. c. 29), for exposing wild birds for sale during the prohibited season, that such birds have been bought or received of or from a person residing out of the United Kingdom. *Whitehead v. Smithers*. 458

GAMING.

1. An agreement to walk a match for £200 a side, the money being deposited with a stakeholder, is a wager, and null and void under 8 & 9 Vict. c. 109, s. 18. And the deposit of the money is not a subscription or contribution for a sum of money to be awarded to the winner of a lawful game within the proviso of that enactment: and although the winner of the match cannot

sue the loser or the stakeholder to recover the stakes, yet a depositor may maintain an action to recover back the share deposited by him with the stakeholder.

The plaintiff and one S. agreed to walk a match for £200 a side, and each deposited £200 with the defendant to be paid to the winner. S. won the match. The plaintiff, after the determination of the match, but before the money was paid over to S., demanded the sum deposited by him from the defendant:

Held, that the plaintiff was entitled to recover his share of the deposit from the defendant. *Diggly v. Higge*. 524, 530 *note*.

GENERAL AVERAGE.

See ADMIRALTY, 474.

GIFT.

See HUSBAND AND WIFE, 759.

H.

HEALTH.

See ANIMALS, 140, 143 *note*.

HOTEL-KEEPER.

See INNKEEPERS, 558, 561 *note*.

HUSBAND AND WIFE.

1. The status of a married woman is not affected by the pronouncing of a decree *nisi* for the dissolution of the marriage. She continues to be subject to all the disabilities of coverture until the decree is made absolute.

2. Action for taking goods of the plaintiff. Plea: coverture of plaintiff at the time of the alleged taking and of plea pleaded. Prior to the alleged taking a decree *nisi* had been pronounced for the dissolution of the plaintiff's marriage, which was made absolute after plea and before the trial:

Held (reversing the judgment of the Exchequer Division), that the plaintiff was still a married woman notwithstanding the decree *nisi*, and that the plea was proved. *Norman v. Villars*. 500

3. M. G., to whom a legacy had been bequeathed to her separate use, received an uncrossed country banker's draft, payable in London, for the amount, less the duty, and she indorsed the draft and handed it over to her husband, and his bankers received the amount and placed it by his direction to his deposit account. The husband died suddenly a few days after. There was evidence pointing to the fact that the wife did not intend to give the check to her husband. In an action against his executors:

Held, that the widow was entitled to be paid the sum claimed. *Green v. Carhill*. 759

I.

ILLEGAL AGREEMENT.

See GAMING, 524, 530 *note*.
INSURANCE, MARINE, 334.

INDICTMENT.

See CRIMINAL LAW, 269, 274 *note*.

INFANTS.

See FRAUD, 68, 90 *note*.

INJUNCTION.

1. When issued to prevent sending goods shipped except as shipped, and to have

proceeds applied to pay bill of exchange. *Matter of Watson.* 764

See SUPPORT, 468.
WAX, 845.

INN.

See EXCISE, 175.

INNKEEPERS.

1. By s. 1 of 26 & 27 Vict. c. 41, no innkeeper shall be liable to make good to any guest of such innkeeper any loss of or injury to property brought to his inn . . . to a greater amount than the sum of £30, except in the following cases: Where such property shall have been stolen, lost, or injured, through the wilful act, default, or neglect of such innkeeper, or any servant in his employ. . . . Sect. 3 requires the innkeeper to exhibit a copy of s. 1 in a conspicuous part of the hall or entrance to his inn, otherwise he cannot claim the protection of s. 1.

2. The defendant, an innkeeper, caused a paper which purported to be a copy of s. 1 of 26 & 27 Vict. c. 41, to be exhibited in the hall or entrance to his inn, but the paper was unintentionally misprinted, and the sentence stood: "Where such property shall have been stolen, lost, or injured through the wilful default or neglect of such innkeeper or any servant in his employ."

The plaintiff, while a guest at the defendant's inn, had stolen from his bedroom at night property amounting to the value of £119:

Held, that the notice contained no statement which admitted the continuance of the common law liability for the goods or property stolen, lost, or injured through the wilful act of the innkeeper or his servant, and therefore did not protect the defendant. *Spice v. Bacon.* 558, 561 *note*.

INSURANCE, MARINE.

1. The defendant insured the plaintiff for £1,200 upon a ship valued at £2,600.

The ship encountering rough weather suffered sea damage, and incurred salvage expenses to the amount of £519. She was repaired, and the result of the repairs, the ship being an old one, was to make her more valuable when repaired than she was at the time of the insurance. The defendant, in an action on the policy to recover for a partial loss, contended that he could not be liable for more than a total loss with benefit of salvage, deducting from such salvage the ship's proportion of salvage and general average expenses, and that the depreciation in value of the ship by sea damage, not the cost of the repairs, was the measure of the partial loss:

Held, that the cost of repair, making the usual deduction of one third new for old, was the measure of the loss if the shipowner elected to repair, and consequently that the assured was entitled to recover such cost of repair up to the amount insured for, even although the loss so estimated might amount to more than a total loss with benefit of salvage:

2. But *held*, that the assured could not recover under the suing and laboring clause in respect of a proportion of the salvage expenses over and above the £1,200, because, the damage done to the ship being so great as already to exhaust the policy and the assured not having abandoned, the salvage expenses did not enure to the benefit of the underwriter. *Lohre v. Auchison.* 226

3. A policy containing any of the words forbidden by 19 Geo. 2, c. 37, s. 1, is illegal, if the insurance relates simply to "ship (and or) ships, steamer (and or) steamers," and does not exclude British vessels.

4. The plaintiffs effected a policy upon commission and profit upon "ship (and or) ships, steamer (and or) steamers;" and the following clause was inserted: "Warranted free from all average and without benefit of salvage, but to pay loss on such part as shall not arrive." The defendant was an underwriter of the policy. The goods to which the commission and profit insured related were shipped on board a British vessel, which was lost by the perils of the seas. The plaintiffs having sued to recover the amount of the defendant's

subscription, or, if the policy were void, the premium paid by them:

Held, that the policy was rendered illegal by 19 Geo. 2, c. 37, s. 1, for the insurance was "without benefit of salvage," and the terms of the policy did not exclude British ships.

5. Per Grove, J., that the prohibition of the statute extends to policies on profit and commission:
6. Per Lindley, J., that the prohibition of the statute extends to policies on profit, and that the policy sued on, being illegal as to profit, was likewise illegal as to commission:
7. *Semble*, per Lindley, J., that the prohibition of the statute extends to policies on commission:
8. *Held*, further, that the illegality was so far the fault of the plaintiffs that they could not recover back the premium. *Alkins v. Jups.* 334

INTOXICATION.

See EXCISE, 182.

ISSUES.

See FEIGNED ISSUES, 687.

J.

JOINT DEBTORS.

See RELEASE, 777, 790 *note*.

JURISDICTION.

See ADMIRALTY, 581, 622, 624.

L.

LANDLORD AND TENANT.

1. Plaintiffs let a house to defendant for seven years from Lady Day, 1868. De-

fendant entered and occupied till Michaelmas, when he left England for America. He left the keys with an agent to dispose of the house if he could, if not, to make the best bargain he could with plaintiffs for the surrender of the term. The agent was unable to find a tenant, and gave the keys in December, 1868, to plaintiffs. They employed a house agent to let the house, and he put up bills in the house and advertised it to let, but the house was not let till Lady Day, 1872, when a new tenant went in. In 1870, for a short time, some workmen of plaintiffs occupied two rooms in the house for the purpose of plaintiffs' saddlery business. Plaintiffs having sued defendant for rent from Michaelmas, 1868, to Lady Day, 1872:

Held, that there had been no possession of the house by plaintiffs so inconsistent with the continuance of defendant's term as to estop plaintiffs from alleging the continuance of it, so as to effect a surrender of the term by operation of law. *Oastler v. Henderson.* 277, 282 *note*.

2. A landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has contracted with the tenant to repair, or when he has been guilty of misfeasance, as, for instance, in letting the premises in a ruinous condition: in all other cases he is exempt from responsibility for accidents happening to strangers during the tenancy.

3. The defendants let to F. a house by an agreement in writing, by which F. agreed "to do all necessary repairs to the said premises except main walls, roof, and main timbers." There was no agreement by the defendants to repair, and the house was in good condition at the time of letting it. Owing to the defendants' negligence in not repairing a part of the main walls, a chimney-pot during the tenancy of F. fell upon the plaintiff, who was a servant of F., and injured him:

Held, that the plaintiff was not entitled to recover compensation from the defendants for the injury sustained by him. *Nelson v. Liverpool Brewery Co.* 308, 310 *note*.

4. In an agreement to let a furnished house there is an implied condition that the house shall be fit for occupation at

the time at which the tenancy is to begin, and if the condition is not fulfilled the lessee is entitled thereupon to rescind the contract.

5. The defendant agreed to rent the plaintiffs' furnished house for three months from the 7th of May, but having at the beginning of the intended tenancy discovered that the house was, owing to defective drainage, unfit for habitation, refused to occupy. The plaintiffs repaired the drains, and on the 26th of May tendered the house in a wholesome condition to the defendant, who refused to occupy or to pay any rent. The plaintiffs having sued for the rent and for use and occupation :

Held, that the state of the house at the beginning of the intended tenancy entitled the defendant to rescind the contract, and that he was not liable for the rent or for use and occupation.
Wilson v. Hutton. 488

See LEASE, 498.

LEASE.

1. The plaintiff and defendant entered into the following agreement not under seal : " Jan. 26. Hand agrees to let, and Hall agrees to take, the large room, &c., from 14th February next until the following Midsummer twelve months, and with right at end of that term for the tenant, by a month's previous notice, to remain on for three years and a half more."

Held, reversing the judgment of the Exchequer Division, that the agreement was divisible, and contained an actual demise for a term less than three years, with a superadded stipulation that the defendant at his option should have a renewal of the tenancy, and that, as to the actual demise, it need not be under seal pursuant to 8 & 9 Vict. c. 106, s. 3. *Hand v. Hall.* 498

See LANDLORD AND TENANT, 277, 282 note.
TRUSTS AND TRUSTEES, 763.

LEGACY.

See WILLS, 733, 761.

LEVY.

See SHERIFF, 550, 553 note.

LIBEL.

1. In an action against the Secretary of State for India the claim stated that plaintiff accepted a commission in the military service of the East India Company upon the basis and faith of the customs, laws, regulations, and provisions of the company's service, which were (amongst others) that an officer entering the service should continue therein so long as he was physically and mentally efficient—and that, before the removal of any officer from any appointment, he should be made acquainted in writing with the accusation preferred against him and should be summoned to make his defence, having a reasonable time allowed him for that purpose, and that the plaintiff was compelled to subscribe to a military fund to provide for widows and orphans of officers, and that if he had continued in the service his widow would have been entitled to an allowance out of a fund called " Lord Clive's Fund." That after the Indian forces had been transferred to the Crown he, while in the performance of military duty, and in all respects physically and mentally competent to perform any duties which were or might be required of him,—was, without any charge of misconduct, called upon to retire from the service, in pursuance of a general order made by the governor general of India with the sanction of the defendant, by which order unemployed officers ineligible for employment by reason of clear misconduct, or proved physical or mental inefficiency, &c., might be required to retire upon a pension; and, upon his declining voluntarily to retire, he was compulsorily placed upon the pension list; and the fact of his removal to the pension list was notified in the usual way by a general order of the commander-in-chief published in the *Gazette* :

Held, on demurrer, that the claim disclosed no cause of action, for the Crown, acting by the defendant, had a general power of dismissing a military officer at its will and pleasure, that the defendant could make no contract with

a military officer in derogation of such powers; and the customs, regulations, &c., relied on by the plaintiff must be taken to be always subject to it, and incapable of superseding it, and further, that the publication in the *Gazette* was an official act under the authority of the Crown, for which the defendant could not be responsible in an action for libel. *Grant v. Secretary.* 865

See DISCOVERY, 244.

LICENSE.

See CRIMINAL LAW, 193.

EXCISE.

NEGLECTANCE, 305, 307 note.

LIEN.

1. When shipper has on goods to pay bill of exchange drawn against them. *Matter of Watson.* 764

See ADMIRALTY, 601, 604 note.

STOPPAGE IN TRANSITU, 764, 773 note.

LIFE ESTATE.

1. In 1831, under the will and upon the death of a testator, his nephew A. became tenant for life, and A.'s eldest son, B., tenant in tail of a freehold estate, subject to an outstanding legal mortgage in fee. In 1849 A. mortgaged his equitable life estate to certain persons, and in 1852, B., having previously barred his equitable estate tail, mortgaged his equitable remainder in fee to the same persons, each mortgage being for a distinct sum, and containing the usual power of sale. Various transfers of the mortgages from father and son took place, in the course of which, subsequently to the passing of the Succession Duty Act, 1853, the outstanding legal estate was got in. In 1863, the then mortgagees, in exercise of their powers of sale, sold the entire estate by auction to C. in fee for a lump sum, but in the conveyance to C. it was recited (as the

fact was) that the purchase-money had been duly apportioned between the life estate and remainder. C. then died, having by his will devised the estate to his nephew D. for life with remainders over, whereupon D. entered into possession and paid duty on his succession to his uncle at 3 per cent. to the full amount as on the fee simple.

The trustees of C.'s will then sold the estate to a purchaser, who raised the objection that although the sale to C. was made under powers contained in mortgages existing before the passing of the act, succession duty had nevertheless attached, and would become payable in respect of B.'s succession upon the death of A., who was still living:

Held, upon a summons taken out by the vendors under sect. 9 of the Vendor and Purchaser Act, 1874.—First: That the mortgages of the life estate and remainder, though made to the same persons, were in all respects independent mortgages, and at the passing of the Succession Duty Act were not merged either at law or in equity; that the sale by the mortgagees under their powers in 1863 was to be regarded as a joint sale of the two interests, and could be supported only upon the principles applicable to joint sales of two trust properties by two sets of trustees; and that accordingly, inasmuch as a higher price was clearly obtainable by selling the fee simple in possession rather than the life estate and remainder separately, and as the purchase-money had been duly apportioned between the two interests, the sale was a proper exercise of the powers:

2. Secondly: That at the date of the Succession Duty Act, A. and B. were respectively entitled in equity as tenant for life and remainderman in fee, subject only to money charges on their respective estates, and therefore that B. was then entitled to a "succession" within sect. 2 of the act; and that since the mortgagees sold, in effect, as the agents of A. and B., C., as purchaser from them, took B.'s succession by "alienation not conferring a new succession" within sect. 15, and became liable to duty accordingly: but
3. Thirdly: That, as a "new succession" had been created by C., duty then became payable on that succession only,

and therefore, the full amount having been paid by D. on his taking under such new succession, the estate was discharged from all further duty on A.'s death.

4. It is the duty of trustees who, having a trust or power to sell the trust property, join with the owner of another property in selling both properties together, first, to see that such a mode of sale is beneficial to their *cestuis que trust*; secondly, to see that their share of the purchase-money is apportioned before the completion of the purchase, and to obtain payment of such apportioned share; and thirdly, to apportion the share themselves, taking care to act under proper advice.
5. The proper mode of apportioning the prices of a life estate and reversion when sold together for a lump sum, is to value both interests separately, and not to put a value on one and deduct that from the total price.
6. The circumstances under which trustees of one property may join with the owner of another in selling both properties together, considered.
7. "By alienation or by any title not conferring a new succession," in sect. 15 of the Succession Duty Act, 1853, means, "either by alienation or by any title other than alienation, in both cases not conferring a new succession."
8. Settlement after the Succession Duty Act: A. tenant for life; B. remainderman in fee. A. and B. convey their estates for money to C. in fee. C. dies, having devised to D. in fee. D. pays duty on his succession from C., and then sells: On A.'s death no more succession duty will be payable than has already been paid by D. *In re Cooper and Allen's Contract.* 725

LIGHTS.

See COVENANTS, 671.

LIMITATIONS, STATUTE OF

1. Certain lands which were subject to a fee farm rent were, in 1812, conveyed

upon a sale by the then owner to the plaintiff's predecessor in title. From 1812 down to 1872 the rent was paid by the vendor and his successors in title, notwithstanding the fact that they had ceased to have any interest in the lands. The persons who, during that period, claimed to be entitled to, and so received the rent, were ignorant of the conveyance of the lands to the plaintiff's predecessor in title. In 1872, the successor in title of the vendor refused to continue the payments of rent, and the defendant, as the owner of the rent, thereupon demanded payment of the rent from the plaintiff, and on her refusal to pay it, distrained upon the land for the arrears. The plaintiff thereupon replevied, claiming that the defendant's title to the rent was barred by discontinuance of the receipt of the rent, under 3 & 4 Wm. 4, c. 27, ss. 2, 3, on the ground that the payments of rent since 1812 not being by the tenant, there had been no receipt of the rent within that act during such period:

Held, that there was no discontinuance of receipt of the rent; first, because the provisions of the statute only apply where there has been an omission by the party entitled to the rent to enforce his remedies for the payment with knowledge that the rent has not been paid, which was not the case with regard to the defendant or his predecessors in title; and, secondly, because under the circumstances it must be presumed that on the conveyance of the lands before mentioned there was some arrangement that the vendor should indemnify the purchaser against the rent, and the payments of rent from 1812 to 1872 were therefore made on behalf of the plaintiff and her predecessors in title; and that the defendant's title was therefore not barred. *Adnam v. Sandwich.* 216

See ULTRA VIRES, 737.

LIQUIDATED DAMAGES.

See DAMAGES, 676, 685 note.

LOST WILL,

See WILLS, 633, 635 note.

M.

MANDAMUS.

1. The appellant was convicted by a metropolitan police magistrate under 5 Geo. 4, c. 83, s. 4, which makes punishable as a rogue and vagabond "every person . . . using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects." The conviction described the offence as "unlawfully using certain subtle craft, means, and device" (omitting the words "by palmistry or otherwise"). Upon appeal to the Middlesex Sessions, the proceedings commenced with an objection from the appellant that the omission of the above words made the conviction bad. The justices, after hearing the point argued, retired, and on their return the assistant judge gave what purported to be the decision of the sessions, quashing the conviction on the objection taken to it. Upon application for a mandamus to the sessions to hear the appeal on the merits, it was proposed to show by affidavits from the justices that the decision given by the assistant judge was contrary to the opinion of a majority of the justices forming the court, and that after such opinion had been communicated to him, he persisted in giving his decision as that of the sessions:

Held, first, that the order of sessions having been duly recorded, it was too late to inquire whether it did or did not represent the opinion of the majority of the justices. Secondly, that the decision upon the form of the conviction was not a decision upon a preliminary matter, but a hearing and adjudication upon the merits, which upon a mandamus could not be reviewed. *Regina v. Justices, etc.* 239

MARRIAGE.

See NAME, 645.

MARRIED WOMEN.

See HUSBAND AND WIFE, 500.

MASTER AND SERVANT.

1. The defendant's carman, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, took out the defendant's horse and cart, and on his way home negligently ran against the plaintiff's cab and damaged it. The course of the employment of the carman was, that, with the defendant's horse and cart, he took out beer to customers of the defendant (a brewer), and in returning to the brewery he called for empty casks wherever they would be likely to be collected, for which he received from the defendant a gratuity of 1d. each. At the time of the accident the carman had with him two casks which he had picked up on his return journey at a public house which his master supplied, and for which he afterwards received the customary 1d.:

Held, that the carman had not re-entered upon his ordinary duties at the time of the accident, and therefore the master was not liable. *Royner v. Mitchell.* 323

2. By the Coal Mines Regulation Act, 1872, s. 52, power is given to frame special rules for the conduct and guidance of the persons acting in the management of a coal mine or employed in or about the same. By a special rule in force in the H. mine, no person "employed in or about the works" was to ascend the pit contrary to the direction of the hooker-on. In the H. mine the workmen had power to dismiss themselves at a moment's notice. The respondents were workmen employed in the H. mine, and being dissatisfied with their working place discharged themselves. They asked the hooker-on to allow them to ascend the pit, but he refused to do so until the ordinary time came for workmen to quit the mine; the respondents however ascended contrary to his direction:

Held, that the respondents had been guilty of a breach of the special rule above mentioned. *Higham v. Wright.* 348

3. The plaintiff, a workman in the employ of a contractor engaged by the defendants, had to work in a dark tunnel rendered dangerous by the passing

of trains. After he had been working a fortnight he was injured by a passing train. The jury found that the defendants in not adopting any precautions for the protection of the plaintiff had been guilty of negligence:

Held, by the majority of the Court of Appeal (Cockburn, C.J., Mellor and Grove, JJ.), reversing the decision of the Court of Exchequer, that the plaintiff having continued in his employment with full knowledge, could not make the defendants liable for an injury arising from danger to which he voluntarily exposed himself:

4. *Held* by Mellish, and Bagallay, L.JJ., dissenting, that the plaintiff, as servant to the contractor and not to the defendants, had entered into no contract with the latter which would modify the ordinary duty of those who carry on a dangerous business to take reasonable precaution that no one should suffer personal injury from the manner in which it is carried on; and that no such contract should be inferred from the plaintiff remaining in his employment. *Woodley v. Metropolitan Railway*. 506, 519 *note*.

See ADMIRALTY, 383.

NEGLIGENCE, 327, 332 *note*.

MINES.

1. A mine owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes, in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine, without default or negligence.
2. But where for his own convenience he does something, e.g., divert the course of a stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow, so that, even if that overflow should be directly and mainly occasioned by an act of nature, his own conduct in not so forming the new and diverted course for the stream, of form

and of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter for consideration in determining the question of his liability.

3. Circumstances which will create liability in such a case. *Fletcher v. Smith*. 38, 47 *note*.

4. Sect. 13 of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), enacts that, where a mine to which the act applies is abandoned, or the working thereof is discontinued, the owner thereof and every other person interested in the minerals of the mine shall cause the top of the shaft to be securely fenced for the prevention of accidents,—provided that, subject to any contract to the contrary, the owner of the mine shall, as between him and any other person interested in the minerals of the mine, be liable to carry into effect this section: and by the interpretation clause (s. 41) "owner" means any person who is the immediate proprietor, or lessee, or occupier of any mine, and does not include a person who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or license for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mine.

5. The respondents, who were owners in fee of mines and minerals, demised a lead mine, part of the estate, for a term of years, subject to a rent or royalties, such royalties to be paid upon the place where the ore should have been gotten or weighed and before it should be taken away; the lease also reserving to the respondents powers of distress and re-entry if the royalties should be in arrear. The lessees ceased working the mine and left and allowed it to remain insufficiently fenced:

Held, that, although the lease was still in force and undetermined, the respondents were guilty of an offence under s. 13 as "persons interested in the minerals of the mine." *Beane v. Mostyn*. 457

See MASTER AND SERVANT, 348.

ULTRA VIRES, 737.

MISTAKE.

See **WILLS**, 781.

MORTGAGE.

See **CHATTEL MORTGAGE**.

MUNICIPAL CORPORATION.

1. Where works are executed by a local authority for the improvement of a street under 11 & 12 Vict. c. 63, s. 69, and 21 & 22 Vict. c. 98, s. 63, and the expenses charged upon the owners of the premises fronting the street, it is necessary before summary proceedings can be taken for the recovery of the amount apportioned upon any such owner, that a demand of payment of the sum so apportioned should be served upon him, and the six months within which the summary proceedings must be taken, under 11 & 12 Vict. c. 43, s. 11, are to be reckoned from such notice of demand, and not from the notice of apportionment, which is not a sufficient demand.
Greece v. Hunt. 181

2. By the Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, s. 117, the treasurer of every county in England and Wales shall keep an account of all sums of money received in aid or on account of the county rate, and of the sums of money expended out of the county rate for other purposes than the cost arising out of the prosecution of offenders committed for trial in such county, and in the case of boroughs having a separate court of quarter sessions of the peace, other than out of coroner's inquests; and shall not more than twice in every year send a copy of the said account to the council of every borough situate within such county in which a separate court of quarter sessions of the peace shall be holden, and which, before the passing of 2 & 3 Wm. 4, c. 64, was chargeable with or liable to contribute in whole or in part to the county rate of such county; and shall make an order on the council of every such borough for the payment of such proportion of such sums as would have been chargeable, after deducting all sums of money re-

ceived in aid of the county rate as aforesaid, if this act had not passed upon such borough as the same shall be bounded according to the provisions of this act.

Before the passing of 2 & 3 Wm. 4, c. 64, the borough of New Windsor included part of the parish of Clewer in Berks, which was exempt from the county rate, and on the passing of that act a further part of the parish of Clewer, which part up to that time had been chargeable with the county rate, was added to the parliamentary borough. With this exception no part of the borough was liable to contribute to the county rate. Upon the passing of 5 & 6 Wm. 4, c. 76, the boundaries of the municipal borough were made coextensive with those of the parliamentary borough. The borough has a separate court of quarter sessions, and a charter containing a non-intromittant clause:

Held, affirming the judgment of the Queen's Bench Division, that the borough of New Windsor was liable to contribute to the account for "other purposes" in respect of the part of the parish of Clewer which, before the passing of 2 & 3 Wm. 4, c. 64, was chargeable with county rate. *The Queen v. Monck.* 254, 267 note.

3. Ashes arising from coals burnt in the furnace of a steam engine used for the purpose of sawing and lifting timber and other materials for carrying on the business of a pianoforte manufacturer, are "refuse of a trade, business, or manufacture," within the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 128. *Gay v. Cadby.* 348

MUTUALITY.

See **STATUTORY DUTY**, 541, 549 note.

N.

NAME.

1. The petitioner having obtained a decree dissolving her marriage with the

respondent, subsequently remarried him. This second marriage was celebrated after publication of banns, in which the petitioner was described by her name of marriage, she having in the interval between the decree dissolving her first marriage and the celebration of the second usually passed by her maiden name. On an application to annul such marriage by reason of an undue publication of banns:

Held, that a name acquired by marriage can only be superseded by a reputed name in cases where the name had been so far acquired by repute as to obliterate the name acquired by marriage. *Fendall v. Goldsmid*. 645

NAVIGABLE RIVERS.

1. *Per LORD HATHERLEY*: There are two totally distinct and different things; the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way.
2. *Per LORD BLACKBURN*: The public who have acquired by user the right to navigate on an inland water have no right of property.
3. *Per LORD GORDON*: The right which the public have is a mere right to use the river for the purposes of navigation, similar to the right the public have to passage along a public road or footpath through a private estate.
4. *Per LORD BLACKBURN*: The owner of the banks of a non-navigable river may without any illegality build a mill-dam across the stream within his own property, and divert the water into a mill-lade without asking the leave of the proprietors *above* him, provided he does not obstruct the water from flowing as freely as it was wont; and without asking the leave of those proprietors *below* him, if he takes care to restore the water to its natural course before it enters their land.
5. *Per LORD GORDON*: The right of a conterminous proprietor in the stream dividing his property from that of his opposite neighbor is very different from that with which your Lordships are now dealing.

6. *Per LORD BLACKBURN*: I think it clear law in England, that, except at the instance of a person (including the Crown) whose property is injured, or of the Crown in respect of an injury to a public right, there is no power to prevent a man making an erection on his own land, though covered with water, merely on a speculation that some change might occur that would render that piece of land, though not now part of the water way, at some future period available as part of it. I think that the land being covered by water is in such a case a mere accident, and that the defenders are as much at liberty to build on the bed of the river (if thereby they occasion no obstruction) as they would be to build on an island which might at some future period be swept away. I advise your Lordships to hold that there is no such power in Scotland. *Ewing v. Colquhoun*. 91, 123 note.

See ACCIDENT, 1, 35 note.

NEGLIGENCE.

1. A barge of the defendant being unlawfully navigated on the river T., the plaintiff, a waterman, complained to the man in charge, who referred him to R., the defendant's foreman; the plaintiff went to the defendant's wharf in order to speak to R., and whilst he was there a bale of goods, by the negligence of the defendant's servants, fell upon him and injured him; the plaintiff had had no warning that the bale might fall:
Held, that the plaintiff was entitled to maintain an action for the injury sustained by him. *White v. France*. 305, 307 note.
2. The defendants were builders and contractors who after the outside of a house was finished had removed the outer hoarding and had employed a sub-contractor to do the internal plastering. One of the men employed by the sub-contractor, in walking, shook a plank which caused a tool to fall out of a window of the house, and the tool in falling injured the plaintiff who was passing along the highway. The jury found that the hoarding had been properly removed, but that the injury was

caused by the negligence of the defendants in not providing some other protection for the public:

Held, that the defendants were entitled to judgment, for there was no evidence that the falling of the tool was a probable accident which might reasonably have been foreseen, so as to make it the duty of the defendants to provide against it.

3. By Lord Coleridge, C.J., and Bramwell, L.J. (Brett, L.J., doubting), that if it was the duty of any one to supply protection against the consequences of the falling of the tool, it was the duty of the sub-contractor and not of the defendants. *Pearson v. Cox.* 327, 332 note.

See ACCIDENT, 1, 35 note.

CARRIER, 362.

COLLISION.

LANDLORD AND TENANT, 308, 310 note.

MASTER AND SERVANT, 323, 506, 619 note.

MINES, 38, 47 note; 327, 332 note; 457.

PARTY WALL, 327, 332 note.

STATUTORY DUTY, 541, 549 note.

NEW TRIAL.

1. After a trial by a judge without a jury any application for a new trial must be made to the Court of Appeal under Order xxxix, Rule 1, whatever the ground of it may be. *Oastler v. Henderson.* 277

NEWLY DISCOVERED EVIDENCE.

See NEW TRIAL, 277.

NOTICE.

See PATENT, 223.

NOVATION.

See STATUTORY DUTY, 541, 549 note.

O.

OBSCENE LITERATURE.

See CRIMINAL LAW, 269, 274 note.

OFFICERS.

See SHERIFF, 297, 304 note.

ORDER.

See ASSIGNMENT, 792, 795 note.

ORDINANCES.

See MUNICIPAL CORPORATIONS.

OWNER.

See NEGLIGENCE, 305, 307 note.

P.

PARTIES.

See HUSBAND AND WIFE, 500.

PARTNERSHIP.

1. A loan was made to a trader at a rate of interest varying with the profits of his business, the amount of the loan and the interest being secured by a mortgage to the lender of the lease of the house where the business was carried on, and of the good-will of the business. The trader became bankrupt:

Held, that the rights of the mortgagee under his mortgage were in no way affected by sect. 5 of the Partnership Law Amendment Act, 1865. *Ex parte Sheil.* 714, 717 note.

See RELEASE, 777, 790 note.

PATENT.

1. Under notice of objection by a defendant, to an action for infringing a patent, that the invention was not new, the defendant can at the trial show that one of two inventions described in the specification is not new, and that the patent is therefore bad. *Sugg v. Silber.* 223

PENALTY.

See DAMAGES, 676, 685 note.

PERFORMANCE.

1. The defendants, on the 6th of July, 1876, sold to the plaintiff by auction a reversion in railway stock, expectant on the decease of a married lady without issue who should attain the age of twenty-one years. The lady was then in her forty-fourth year, and had never had any children. The sale was subject to conditions, whereby it was provided that the purchaser should pay a deposit and the purchase be completed on or before the 17th of August then next; "but should the completion of the purchase be delayed from any cause whatever beyond that period, the purchaser is (but without prejudice nevertheless to the vendor's rights under the seventh or any other condition of sale) to pay interest on the balance of the purchase-money from that day until the completion of the purchase." By the seventh condition, should the purchaser neglect or fail to comply with any condition, "the deposit money shall be forfeited and the vendor . . . shall be at full liberty to resell the property . . . and the deficiency (if any) arising by such second sale, together with all charges attending the same, shall be made good by the defaulter." There was no express stipulation that time should be of the essence of the contract. The plaintiff at the time of sale paid a deposit of £30. The defendants were not able to complete the sale on or before the 17th of August, and the plaintiff two days afterwards brought his action to recover the deposit. The defendants were able and willing to com-

plete the sale at the end of November, 1876:

Held, that under the conditions time was not of the essence of the contract, and the plaintiff was not entitled to recover. *Patrick v. Milner.* 812

See AUCTIONEER, 154.

PLACE OF AMUSEMENT.

See CRIMINAL LAW, 193.

POWER.

See TRUSTS AND TRUSTEES, 763.

PREFERRED STOCK.

See DIRECTORS, 647, 670 note.

PRESUMPTION.

See WILLS, 733.

PRINCIPAL AND AGENT.

1. How far master of vessel is of owners. *The Aneroid.* 601, 604 note.

See ADMIRALTY, 383.
AUCTIONEER, 154.

PRO RATA FREIGHT.

See FREIGHT, 550.

PROFITS.

See PARTNERSHIP, 714, 717 note.

PROMISSORY NOTES.

See *PROTEST*, 720.

PROTEST.

1. It is sufficient for the holder of a dishonored bill of exchange to give notice of dishonor to the drawer himself, even though before the dishonor he has been adjudicated a bankrupt, and a trustee of his property has been appointed.
2. The holder of a bill of exchange which was dishonored after the appointment of a trustee in the bankruptcy of the drawer, sent notice of the dishonor to the drawer by post to an address which he had left for some months :
Held, that, that address being the only one with which the holder was acquainted, the notice was sufficient.
3. The holder was, therefore, allowed to prove in the bankruptcy in respect of the bill. *Matter of Baker*. 720

R.

RAILWAYS.

1. The Railway Commissioners, under 36 & 37 Vict. c. 48, made an order requiring the C. and the S. E. Railway Companies to make arrangements and to afford facilities for the transference of traffic from the line of one company to the other; to arrange the arrivals of their trains at a junction in a particular manner, and directing the C. Company to run trains over a disused branch line; and, upon non-compliance with the order, made a further order imposing penalties upon both companies for their disobedience :
Held, that the first order was invalid, and that a prohibition must be granted to restrain the commissioners from enforcing it; for, assuming that they had jurisdiction to require each company separately to give facilities according to its powers, they were not entitled to order two companies to act jointly in doing what neither could do separately.

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2. *Quære*, whether, if the first order had been valid, the commissioners had, under s. 6, jurisdiction to impose penalties for non-compliance with it. *Matter of Toomer*. 550
3. Where an inspector of the Board of Trade reports to the Board of Trade that the opening of a railway will be attended with danger to the public by reason of the incompleteness of the works, and gives the grounds of his opinion, the requisitions of the 5 & 6 Vict. c. 55, s. 6, are satisfied—the Board of Trade has exclusive jurisdiction in the matter—and the court will not enter into the question whether the reasons given by the inspector do not show on the face of the report that he has come to a wrong conclusion. *Attorney-General v. Great Western*. 686
4. A by-law made by a railway company imposed upon a passenger failing or refusing to produce his ticket the liability to pay the amount of the fare from the station whence the train, by which such passenger travelled, had originally started :
Held, that there must be a demand of the specific sum payable in respect of such fare, in order to enable the company to recover it :
5. *Semble*, that such sum is a penalty or forfeiture within 8 & 9 Vict. c. 20, s. 145. *Brown v. Great Eastern Railway*. 185

See *CARRIERS*, 46, 67 *nota*.

RAPE.

See *CRIMINAL LAW*, 188, 192 *nota*.

REGISTRY.

See *ADMIRALTY*, 595, 604.

RELEASE.

1. J. gave to a bank a guarantee for £1,000 in favor of A. & Co., representing at the same time to the bank manager that he was a partner in that firm,

but that he wished the fact of his partnership to be kept secret. The guarantee described him as a partner in the firm. Some time afterwards A. alone, as A. & Co., filed a liquidation petition, and the bank tendered a proof in the liquidation for advances which they had made to A. & Co. after the guarantee. After this the bank sued J. at law for £5,659, alleging him to have been a partner with A. J. filed a bill in chancery to restrain the proceedings in the action, denying the alleged partnership. A compromise was entered into between the bank and J., by which £2,818 was paid to them in satisfaction of their claim against J. and of a claim which they made against S., who had also given them a guarantee on behalf of A. & Co. J.'s guarantee was given up to him, a receipt for £1,000 being indorsed on it by the bank manager "in payment and discharge of the within guarantee, and also of all claims against J. in reference to or in connection with A. & Co.":

Held, by the Court of Appeal, that J. must be taken to have been an actual partner with A., but that the receipt did not operate to release J. so as to preclude the bank from maintaining a proof against A.'s estate.

2. *Per* BACON, C.J.: Though a creditor has a right to sue jointly with his debtor a person who has held himself out as a partner with the debtor, yet, as between themselves, the ostensible partner is a surety only, not liable to contribution, and therefore a release of the ostensible partner by the creditor does not release the debtor.

3. The bank's proof was sent to the trustee in December, 1872. In December, 1875, he gave notice, that he rejected the proof, alleging as an excuse for the delay that he had only recently discovered the facts which justified the rejection:

Held, by BACON, C.J., that it was too late for the trustee to give such a notice, but that he ought to have applied to the court to expunge the proof.
Matter of Good. 777, 790 note.

See ULTRA VIRES, 787.

REMEDY.

See STATUTES, 1.

RENT.

See LANDLORD AND TENANT, 277, 282 note.
VENDOR AND PURCHASER, 179.

REVERSIONER.

See FRAUD, 68, 90 note.

RIVERS.

See NAVIGABLE RIVERS.

S.

SALE.

See STOFFAGE IN TRANSITU, 169, 764, 773 note.

SALVAGE.

See ADMIRALTY, 566, 609.
INSURANCE, MARINE, 226.

SCHOOLS.

1. Where, upon application to a magistrate by a school board for a summons against the parent of a child for not causing it to attend school, contrary to by-laws made by the board under the Elementary Education Act, 1870, it appears that the parent has habitually neglected to provide instruction for the child within the meaning of the Elementary Education Act, 1876, s. 11, the magistrate is entitled, and it is his duty, to refuse to grant the board a summons under the by-laws, and to require them to take out a summons under s. 11,—for the option given by the Elementary Education Act, 1876, s. 50, of proceeding either under the statute or the by-laws applies only to offences "punishable" under the act,

and the offence of "habitual neglect" is not so punishable. *Matter of Murphy*. 181

SEA.

See NAVIGABLE RIVERS.

SECURITY FOR COSTS.

1. An appellant who had been ordered to give security for the costs of an appeal from a decree failed to do so for nine months. At the end of that time, which was more than a year after the decree, the respondent moved to have the appeal dismissed with costs for want of prosecution, and the delay not being explained the court ordered accordingly. *Judd v. Green*. 709

SEDUCTION.

See CORROBORATION, 284, 288, note; 289, 296 note.

SHERIFF.

1. If a sheriff, who has seized pursuant to a writ of *fi. fa.* the goods of an execution debtor, is paid out before sale, he is not entitled to poundage, but he is entitled to a discharge fee for the release of the goods.
2. The goods of the defendants were seized by the sheriff of M. under a writ of *fi. fa.* issued at the suit of the plaintiff, and afterwards a similar writ in an action by I. against one of the defendants was lodged with him. The sheriff remained in possession some days afterwards, but ultimately the amount of the judgment debts was paid on behalf of the defendants, and no part of the goods seized was sold. The sheriff claimed and received payment of a discharge fee in each action, and in the action at the suit of I., poundage and a levy fee. A rule was obtained under

1 Vict. c. 55, s. 3, for a return of these fees and the poundage:

Held, that the sheriff was not entitled to poundage, which must be returned; but that he was entitled to retain the discharge fees and the levy fee. *Roe v. Hammond*. 297, 304 note.

3. A sheriff's officer in the execution of a warrant of *fi. fa.* went with another man to the debtor's house, showed him the warrant, and demanded payment, and told him that in default of payment the man must remain in possession and further proceedings be taken. The debtor then paid the sum demanded in the warrant, which included poundage and officer's fee:

Held, that there had been in substance a levy, and that the sheriff was entitled to poundage and fee, though there had been no sale. *Bisnicks v. Bath Colliery Co.* 550, 553 note.

SHIPS.

See ADMIRALTY.
TITLE, 626.

STAKEHOLDER.

See GAMING, 524, 530 note.

STATUTE.

1. A statute which refers to the matter of a common law liability and declares to whom it shall attach, will not thereby create a new and extended application of that liability, unless it contains words expressly declaring such a purpose.
Per THE LORD CHANCELLOR (Lord Cairns): The clause is a clause of procedure only, dealing with the mode in which a right of action already existing shall be asserted, but not creating a new and extended liability.
2. LORD GORDON, *diss.*, on the ground that the intention of the Legislature in passing the act must be decided by the ordinary meaning of the words used, and

here the words used in the first portion of the section were words creating a liability without any restriction whatever. *River Wear Comrs v. Adamson.* 1

3. By the Ecclesiastical Dilapidations Act, 1871, s. 29, "within three calendar months after the avoidance of any benefice . . . the bishop shall direct the surveyor, who shall inspect the buildings of such benefice, and report to the bishop what sum, if any, is required to make good the dilapidations to which the late incumbent or his estate is liable":

Held, that the provision as to the time within which the bishop is to direct the surveyor to inspect and report upon the buildings of a benefice after its avoidance is directory only, and not imperative; and that a direction to inspect and report made by a bishop more than three months after the avoidance of a benefice may be valid. *Caldow v. Pixell.* 462

parish) is imposed on the undertakers for the neglect of each of the above duties, and for the neglect of (2) and (4) they are further to forfeit to the commissioners or rate payer a penalty of 40s. a day, for each day during which such neglect continues after notice in writing of non-supply.

4. The plaintiff brought an action for damages against a waterworks company for not keeping their pipes charged as required by the act, whereby his premises situate within the limits of the defendants' act were burnt down: *Held* (reversing the decision of the Court of Exchequer), that the statute gave no right of action to the plaintiff. *Atkinson v. Newcastle, etc.* 541, 549 *note*.

STOCK.

See DIRECTORS, 388.

STATUTORY DUTY.

1. The mere fact that the breach of a public statutory duty has caused damage does not vest a right of action in the person suffering the damage against the person guilty of the breach; whether the breach does or does not give such right of action must depend upon the object and language of the particular statute.
2. By the Waterworks Clauses Act, 1847, the undertakers are: (1) to fix and maintain fire-plugs; (2) to furnish to the town commissioners a sufficient supply of water for certain public purposes; (3) to keep their pipes to which fire-plugs are fixed at all times charged with water at a certain pressure, and to allow all persons at all times to use the same for extinguishing fire without compensation; and (4) to supply to every owner or occupier of any dwelling house, having paid or tendered the water rate, sufficient water for domestic purposes.
3. By s. 43 a penalty of £10 (recoverable summarily before two justices, who may award not more than half the penalty to the informer and are to give the remainder to the overseers of the

STOCKHOLDER.

1. In order to give jurisdiction to the court or judge to order rectification of the register of shareholders in a company, under s. 35 of the Companies Act, 1862 (25 & 26 Vict. c. 89), it is not necessary that there should be actual default in the company.
2. It is a matter of discretion whether the court or judge will exercise the summary jurisdiction; and in a complicated or doubtful case the jurisdiction ought not to be exercised; but when the legal title in the applicant is clear the order ought to be made.
3. S. employed A. to buy for him forty shares in a limited company. A. negotiated for the purchase with P., who was the registered holder of forty shares. S. paid A. the purchase-money for the shares. P. executed a transfer to S., and forwarded it to the secretary of the company, together with the scrip, and the secretary wrote on the transfer, "certificates lodged at company's office," and returned it to P., retaining possession of the scrip. P. forwarded the transfer to A., and he

sent it to S., who executed the transfer and returned it to A., in order that he might get S.'s name put upon the list of shareholders, the articles of association requiring the duly executed transfer to be lodged at the chief office of the company before the transferee could be registered. A. acted throughout for both parties, but he did not pay over the price to P., and falsely told him that the purchaser would not complete; upon which P. demanded back the transfer, and A. cut off P.'s signature from the transfer and sent the signature to P., and afterwards absconded. S. demanded to have his name put upon the register as the owner of the forty shares, for which the scrip had been deposited with the company; but the company refused, at the instigation of P. On affidavits disclosing these facts, S. applied, under s. 35 of the Companies Act, 1862 (25 & 26 Vict. c. 89), for a judge's order to rectify the register by inserting S.'s name as the holder of the forty shares. P. opposed the summons; the company appeared, but offered no opposition. The order having been made as prayed:

Held, by the Common Pleas Division and Court of Appeal, that, S. having paid P.'s agent for the shares, and the transfer having been duly executed, S. had a legal title to the shares; that the judge had jurisdiction to decide the matter, if he thought right, and that he had exercised a proper judicial discretion in deciding and making the order.
Matter of Shaw. 215

4. R., the chairman of the board of directors of a company in which he held fifty shares, signed a letter of application for 450 more, striking out the reference to the payment of the deposit which was required on application for shares. There was some evidence to show that this application was made in pursuance of a previous promise by R. to become a holder of 500 shares, and that on the faith of this promise he had been elected chairman.

No notice was taken of the application till after seven months, when at a board meeting it was proposed and seconded that 450 shares should be allotted to R. R., who was present, handed in a letter withdrawing his application, and deposed that he had previously withdrawn it verbally.

There was no proper evidence that the resolution to allot shares to R. had been carried, but a letter of allotment was sent him on the following day. The company was at this time in a hopeless state, and a resolution for winding it up was passed a fortnight afterwards:

Held, by Malins, V.C., that, although if R. had been an outside applicant the delay and the informality of the allotment would have exempted him from liability as to the 450 shares, he could not avail himself of the delay and informality which he, as chairman of the board of directors, was bound to have prevented, and that he was a contributory in respect of those shares.

Held, on appeal, that the offer by R. to take shares was not shown to have been accepted by the company before it was withdrawn by him, and that he was not liable in respect of the 450 shares. *Rizzo's Case.* 709

See CORPORATIONS, 796.

DIRECTORS, 383, 647, 670 *note*, 798.

STOPPAGE IN TRANSITU.

1. The transfer of a bill of lading for valuable consideration to a *bona fide* transferee defeats the right of stoppage *in transitu* of the unpaid vendor of the goods, although the consideration was past and not given at the time the bill of lading was handed to the transferee by the lawful holder.
2. In December, 1875, G. & Co. purchased from defendant a shipment of nuts, to be paid for by acceptance at three months on receipt of shipping documents. On the 1st of January, 1876, G. & Co., being already indebted to plaintiff, applied to him for a further advance, which, he said, he would give, but they must first cover their account. G. & Co. promised to give him cover (not naming any particular securities), and plaintiff at once advanced them a further sum of £2,000. On the 4th of January the bill of lading of the nuts, indorsed in blank, came into the possession of G. & Co. from defendant, and they accepted defendant's draft; and on the following day they handed the bill of lading to plaintiff

with other securities, in fulfilment of their promise to give him cover. This transaction between plaintiff and G. & Co. was *bona fide*. On the arrival of the ship on the 3d of February, G. & Co. having in the meantime stopped payment, defendant sought to stop the nuts *in transitu*, and plaintiff claimed them under the bill of lading:

Held, that the plaintiff had a good title as against the defendant. *Leask v. Scott*. 169

3. An agreement was entered into between L., a merchant in London, and W., a manufacturer in Yorkshire, that W. should from time to time supply L. with goods, W. drawing upon L., and L. accepting, bills of exchange for the invoice price of the goods. L. was to ship the goods to R. at Shanghai, for sale on L.'s account. On receipt of the bills of lading L. was to send them to R., to whose order they were to be made out. W. was to have a lien upon the bills of lading, and each shipment of goods in transit outwards, or in the hands of the consignee or any other persons, which lien, however, was to extend only to the particular shipment, and was to cease when the bills of exchange given for that shipment had been paid. No notice of this agreement was given to R. In pursuance of the agreement L. ordered a parcel of goods of W. The goods were packed by W.'s packer, who forwarded them by railway to London in bales marked for Shanghai, and addressed to a ship called the Gordon Castle designated by L., which was loading in the West India Docks for Shanghai. The freight to London was paid by W. The packer in advising L. of the dispatch of the goods, told him that they were "at his disposal." L. accepted a six months' bill of exchange drawn upon him by W. for the invoice price. The railway company, in advising L. of the arrival of the goods at their Poplar Docks Station, told him that they remained at his order and were held by the company as warehousemen at his risk, but added, "will be sent to the Gordon Castle." The goods were shipped on board that vessel. The bills of lading were by L.'s directions made out to the order of himself or assigns, but they were never delivered to him by the shipowners, inasmuch as he did not pay the freight.

The ship sailed for Shanghai with the goods on board. A few days previously L. had stopped payment, and shortly after she had sailed he committed an act of bankruptcy, upon which he was adjudicated a bankrupt. The bills of lading were still in the possession of the shipowners in London, of whom they were claimed by W. and by the trustee in the bankruptcy. It was arranged that the goods should be sold by the agent of the shipowners at Shanghai, and the proceeds of sale paid to the person who should be entitled to them:

Held, that the agreement did not deprive W. of the right to stop the goods *in transitu*; that the transit was not ended till the goods arrived at Shanghai, and that the demand by W. of the bills of lading from the shipowners was an effectual stoppage *in transitu*. Consequently, that W. was entitled to have the bill of exchange satisfied out of the proceeds of sale:

4. *Held*, also, that W. could have obtained an injunction to restrain L. from sending the goods to any other destination than Shanghai:
5. *Held*, also, that the agreement was not an instrument which required registration under the Bills of Sale Act. *Matter of Watson*. 764, 773 note.

SUPPORT.

1. The vendor of land adjoining other land of his own under which are mines and minerals, and who knows at the time of the sale that the vendee is about to erect upon the land so purchased substantial buildings, impliedly covenants that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant.
2. A. sold land to B. for the purpose of an iron foundry. Adjoining the land so sold to B., A. had other land under which was coal. A. afterwards leased the minerals to C., who commenced working the coal within such a distance from the land of B. as to be reasonably calculated to endanger its stability:

Held, ground for an injunction against

A. and C., although no actual damage had been sustained by B. *Siddons v. Short*. 468, 473 note.

SURPRISE.

See NEW TRIAL, 277.

SURRENDER OF LEASE.

See LANDLORD AND SERVANT, 277, 282 note.

T.

TIME.

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TITLE.

1. An action of co-ownership was instituted on behalf of G. W. against a British vessel, and against J. H., defendant intervening. The statement of claim alleged, *inter alia*, that by bill of sale duly registered in 1867 the defendant, as sole owner of the vessel, transferred for valuable consideration a moiety of the same to one T. W., and that T. W., by a subsequent bill of sale duly registered in 1876, transferred the said moiety of the vessel to the plaintiff for value. The defendant, in his statement of defence, denied that he had at any time signed a bill of sale transferring any shares in the vessel to the said T. W., and alleged, *inter alia*, that if any such bill of sale had been registered, the same was made and registered fraudulently. At the hearing of the action the registration and execution of the bills of sale were proved. The court thereupon directed that the question whether the fraud alleged could affect the rights of the plaintiff should be raised on demurrer. The plaintiff thereupon demurred to so

much of the statement of defence as alleged fraud:

Held, that the demurrer must be sustained on the ground that, the legal ownership in the moiety of the vessel having passed to the plaintiff for valuable consideration by the execution and registration of a bill of sale without notice of fraud, the plaintiff had thereby acquired a title to the same as against the defendant. *The Horlock*. 626

See STOPPAGE IN TRANSITU, 169.

TOWN.

See MUNICIPAL CORPORATIONS.

TRIAL.

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TRUSTEES.

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TRUSTS AND TRUSTEES.

1. Two contiguous estates were devised to trustees upon trust for distinct *census que trust*. By an order made under the Settled Estates Act, power was given to the trustees to grant mining leases in conformity with and subject to the provisions of the Settled Estates Act; such leases to be granted with the consent of the respective tenants for life if of age. The trustees and the two tenants for life entered into an agreement with the defendants to grant them a mining lease of the two estates for forty years (or fifty years if the court should consent); both estates were intended to be comprised in the same lease, and the rents and royalties were to be reserved as if they were one estate, and there was to be one shaft for working the minerals under both estates; and it was also agreed

that the lessor should be at liberty to apply to the court under the Settled Estates Act for further powers of leasing:

Held (affirming the decision of Hall, V.C.), that the trustees had no power to grant such a lease of the two estates, and specific performance of the agreement was refused.

2. Whether in any case a lease by trustees by one demise of two estates held upon distinct trusts would not be a breach of trust—*Quare. Tolson v. Sheard.* 768

See LIFE ESTATE, 725.

U.

ULTRA VIRES.

1. The plaintiffs, who were owners of a coal mine, claimed damages against the owners of an adjoining mine for having broken their barriers and worked their coal. The wrongful acts were committed in 1863 while the adjoining mine was being worked by the Hartlepool Railway Company. The boundaries of the two mines were settled by mutual agreement in 1862, and after some lengthy negotiations a release was executed in 1864, by which all previous wrongful acts were condoned and released on both sides. An act of Parliament was passed in 1863 by which the Hartlepool Railway Company were to sell their mines within five years; and in 1865 the said railway company was amalgamated with the defendant company, and all their assets and liabilities were transferred to them:

Held, first, that although it was *ultra vires* of the railway company to work mines, the act of 1863 implied that the company were to have power to work their mines until the mines were sold, and that upon the amalgamation with the defendant company the latter became liable for the wrongful acts of their predecessors:

2. Secondly, that the wrongful acts committed in 1863 were not condoned by the release of 1864, the plaintiffs hav-

ing had no ground for suspecting that while the release was in negotiation the previous settlement of boundaries had been broken:

3. And, thirdly, that the Statute of Limitations only commenced to run from the time of the discovery of the wrongful acts, there being no laches attributable to the plaintiffs for not having discovered the damage prior to 1870, two years before the filing of the bill. *Ecclesiastical, etc., v. North Eastern, etc.* 737

See CARRIERS, 48, 67 note.

USE AND OCCUPATION.

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V.

VENDOR AND PURCHASER.

1. Claim, that by an agreement for the purchase by the plaintiffs of property belonging to the defendants, the purchase was to be completed on the 29th of September, 1869, from which time the plaintiffs were to receive all rents and profits and to pay interest on the purchase-money until the completion of the purchase. That the purchase was not completed until the 13th of March, 1876, and that the plaintiffs had duly paid the interest. That the defendants had remained in possession, but had paid no rent. That the plaintiffs claimed rent for use and occupation at the rate of £150 per annum as a fair value. The defendants demurred:

Held, affirming the judgment of the Queen's Bench Division, that under the agreement a fair rent must be paid by the defendants for the time they remained in possession, and that by demurring they had admitted £150 a year to be a fair rent. *Metropolitan Railway v. Defries.* 179

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1. Of seaworthiness. *Cohn v. Davidson*. 208
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WAY.

1. The plaintiffs had been entitled from 1855 to a carriage way to property of theirs over a railway by a level crossing. By an act of Parliament obtained by the company in 1875, reciting that it was expedient that the rights of way in respect of certain footways which crossed the railway on the level should be extinguished, it was enacted that all rights of way in, over, or affecting the footways numbered 2, 4, 5, 6 and 7, on the deposited plans, should be extinguished. No provision for compensation was made. The roadway in question was numbered 5 on the deposited plans, and was thereon marked "roadway and footway," the others being marked simply "footway":
Held (affirming the decision of Malins, V.C.), that upon the true construction of the act, it did not interfere with private rights of way, but only with public rights of footway, and that an injunction restraining the railway company from obstructing the way had
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been rightly granted. *Wells v. London, Tilbury, &c.* 845

2. By an award under an Inclosure Act, it was directed that certain of the allottees and the owners for the time being of their allotments should forever thereafter have a way-right and liberty of passage for themselves, their respective tenants and farmers, as well on foot as on horseback, and with their carts and carriages, and to lead and drive their horses, oxen, and other cattle from the common highway over the east end of the allotments to their respective allotments, doing as little damage to the soil or the corn, grass, or herbage, as might be, and in case the allottees should "street out" the way, that the same should always remain eleven yards wide, but the road was not to be a way of right for any other persons whomsoever than as aforesaid. The owner of one of the allotments commenced building houses upon it, and began to lay down a metalled road where there had only been an ordinary cart track over the adjoining allotments:

Held (affirming the decision of Malins, V.C.), that the allottees were not confined to the use of the road for agricultural purposes only, but were entitled to construct a substantial roadway suitable for the purposes to which the land was now in course of being applied. *Newcomen v. Coulson*. 851, 862 *note*.

WILLS.

1. A testator drew his pen through the lines of various parts of his will, wrote on the back of it "This is revoked," and threw it among a heap of waste papers in his sitting-room. A servant took it up and put it on a table in the kitchen. It remained lying about in the kitchen till the testator's death seven or eight years afterwards, and was then found uninjured:
Held, that the will was not revoked, the words "or otherwise destroying" in 7 Wm. 4 & 1 Vict. c. 26, s. 20, not being satisfied, as, whatever the testator intended, the will had not been actually injured. *Cheese v. Lovejoy*. 633, 635 *note*.
2. A testator directed his freehold estate to be sold, and his debts to be paid by

his widow, his sole executrix. He then bequeathed to her, "all my money, cattle, farming implements, &c., she paying my brother J. C. the sum of " and my brother L. C. the sum of ":

Held, that the widow was entitled to the whole of the testator's property after payment of his debts, and funeral and testamentary expenses. *Chapman v. Chapman.* 723

3. Bequest of £100, after the death of tenant for life, to P., who was named as one of the trustees and executors, but renounced and disclaimed:

Held, that the presumption that it was given to him in his character of executor was rebutted by the fact of its being payable after the death of the tenant for life, and that he was entitled to the legacy.

4. Where there is a gift of residue to be divided among certain persons and classes of persons, the costs of ascertaining of whom such classes consist are payable out of the whole residue before the same is divided. *Matter of Reeve's Trust.* 733

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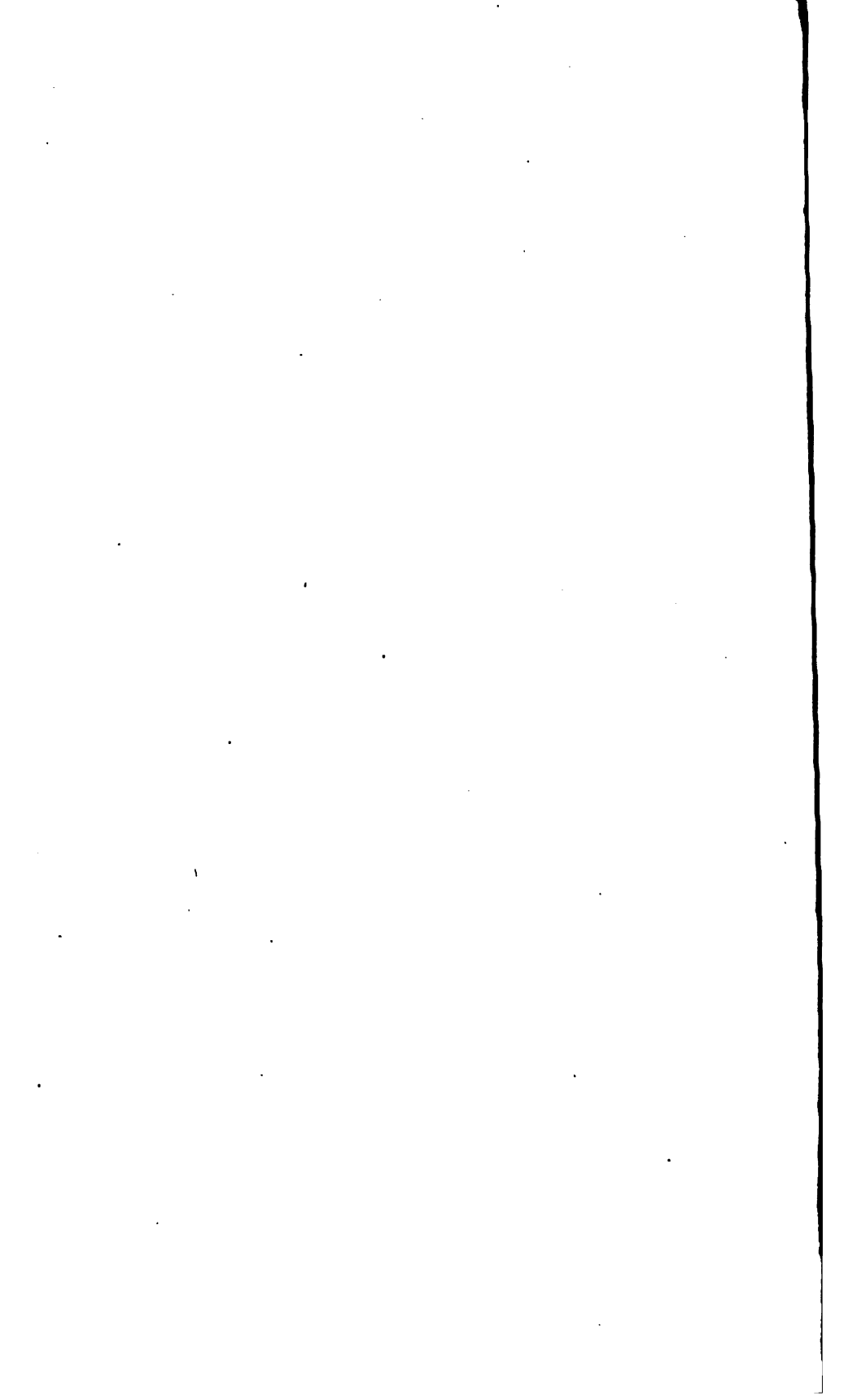
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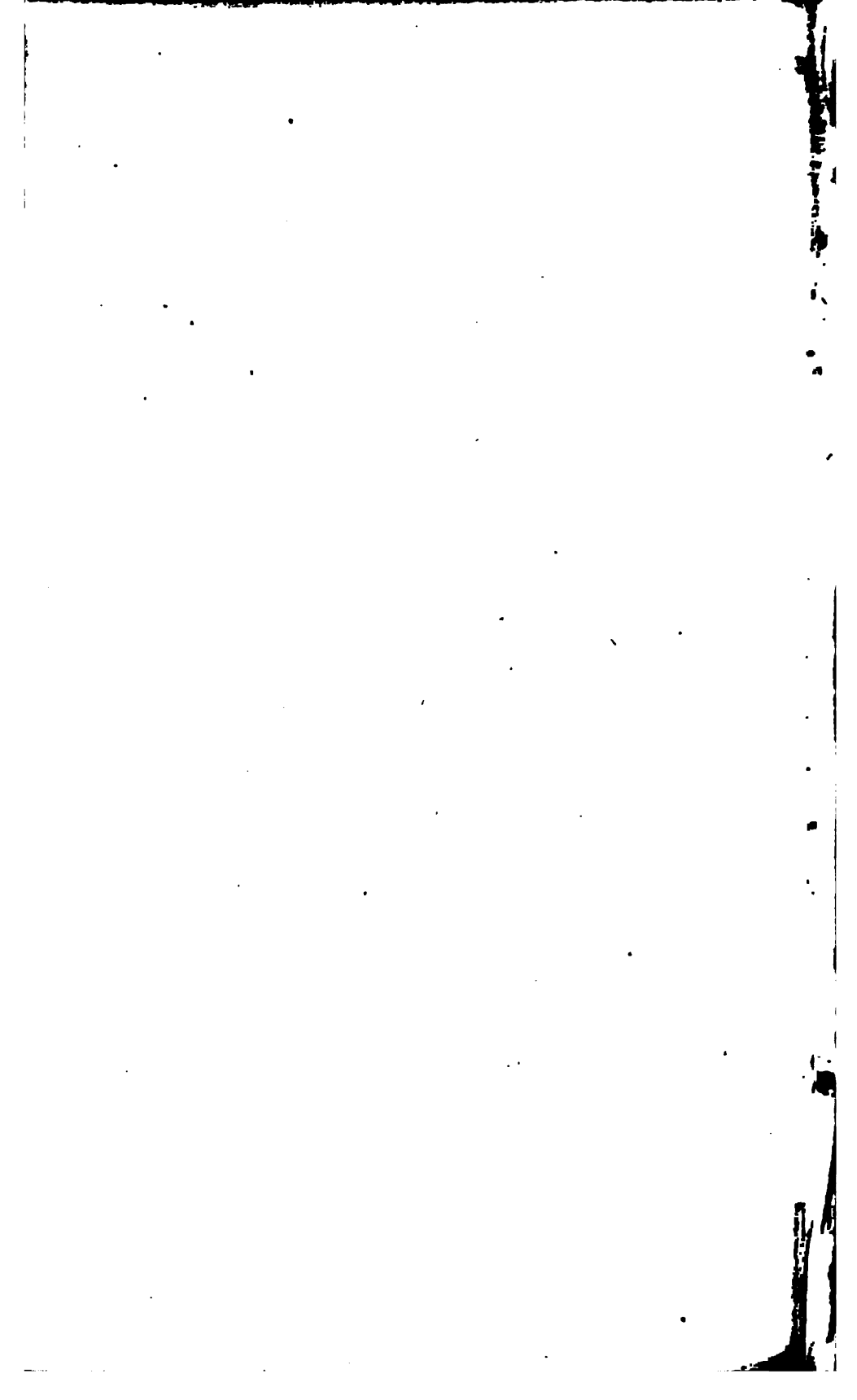
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